United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1229

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

POCONO INTERNATIONAL CORPORATION and CHARLES GOLDBERG,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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ISSUES PRESENTED FOR REVIEW

The issues presented for review on this appeal are:

1. Whether the fraud counts must be dismissed because the court erroneously permitted a constructive amendment to the indictment;

2. Whether the fraud counts must be dismissed as to Goldberg because the evidence fails to show that he made any false representations;

3. Whether the fraud counts must be dismissed as to Goldberg because the regulations as construed were unconstitutional for failure to give fair warning of the crime charged;

4. Whether both the fraud and registration counts must be reversed as to Goldberg because the court's charge was confusing, seriously misleading and erroneous;

5. Whether the registration counts must be reversed as to Goldberg because the evidence is so palpably weak that they can only rest on impermissible inferences of wrongdoing drawn from the baseless fraud charges which the Government failed to prove.

STATEMENT OF THE CASE[1]

This case was the Government's initial prosecution under the recently enacted Interstate Land Sales Act, 15 U.S.C. § 1701, et seq. The act provides in general that before sales in certain subdivisions may be commenced, a statement of record (registration statement) must be in effect and a printed property report (prospectus) satisfying the statutory requirements must be furnished to purchasers in advance of sale. 15 U.S.C. § 1703 (a)(1). General fraud provisions follow, 15 U.S.C. § 1703(a)(2), in relevant part making it unlawful for a developer:

> (A) to employ any device, scheme, or artifice to defraud, or
>
> (B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report[2] or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or . . .

Defendants were charged in a 42-count indictment (A.5) with 15 counts of violating the fraud provisions of the Land

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[1]Extensive transcript references have been omitted from the opening statement which only summarizes the evidence. The brief, which discusses the record in detail, is fully annotated. It should be noted that the numbering of the transcript is somewhat unusual. The actual transcript begins at page 1. However, neither the conference immediately before the trial nor the opening statements to the jury were originally transcribed. When ordered, they were numbered, respectively, 1 through 14 and 1-1 through 1-28a. The only references in the brief to pages 1 through 14 are to the pre-trial conference.

[2]There were, however, never any allegations of misrepresentations with respect to information included in the statement of record or property report, although the judge erroneously so charged. See Point IV, supra, pp. 43, 44-46. The obviously prejudicial impact of this on the jury cannot be overstated.

Sales Act (the "land fraud"), and 12 counts of selling unregistered land (the "registration counts").[3] Seven of the latter counts also alleged failure to supply a property report.[4] Based on the same alleged fraud, defendants were also charged with 15 counts of violating the general mail fraud statute, 18 U.S.C. § 1341 (the "mail fraud").[5] All of the counts were based on sales to 16 individual purchasers. Most of the sales were charged as multiple violations of all four provisions, although a few were limited to only two or three. The jurisdictional basis for all of the counts involving each purchaser was the mailing of a sole deed or check to each of the purchasers on the same date.

Although the Government initially claimed it would produce all of the purchasers to testify, it was forced to dismiss 18 counts when only six purchasers appeared (the testimony of a seventh was stipulated to). Two additional counts were dismissed when it was conceded there was no evidence of any fraud with respect to one of the purchasers who did appear, and a third when it was established that the sale to another occurred after the registration was effective. At the close of the Government's case all of the property report counts against Goldberg and three of the property report counts against Pocono were also

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[3]The land fraud counts are 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 40, 41, 42; the registration counts 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38.

[4]Counts 16, 20, 22, 24, 26, 28, 36.

[5]Counts 1-15.

dismissed when the Government conceded there was no evidence to support any of them.

After the Government rested, defense counsel, Elliott Taikeff, Esq., made a motion for judgment of acquittal on all counts (Tr. 1093), which the judge denied (Tr. 1096, 1099). The defense then rested without putting on any case and without having made any written request to charge.[6] The case against both defendants then went to the jury on the remaining seven counts of mail fraud, seven counts of land fraud, seven registration counts, and four additional counts against the corporation alone of failing to provide a property report.[7]

After seven hours of confused deliberations during which the jury sent out six notes asking for further clarification and for various exhibits and testimony, a guilty verdict was returned on 20 counts. (One of the registration counts was dismissed because of a defect in the form of the verdict.) Although placing Goldberg on probation on the 14 fraud counts, the judge declared that he was taking these convictions into consideration (A. 143-144) in sentencing him to 18 months imprisonment on each of the registration counts (to be served concurrently) (A. 144, 147). Goldberg was continued on bail pending appeal. A cumulative fine of $37,500 was imposed on the corporation (A. 149).

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[6]Although the record reveals that counsel did submit one request on a minor point which was marked as a Court's Exhibit (Tr. 1126), neither Mr. Taikeff's office, the Government, nor the judge were able to supply a copy.

[7]Counts 2, 4, 7, 8, 9, 11, 12 (mail fraud); 19, 21, 27, 29, 31, 33 (land fraud); and 16, 18, 20, 26, 28, 30 and 32 (registration).

Goldberg was the vice president of Pocono International Corporation ("Pocono"), engaged in land development in the Pocono Mountains in Pennsylvania. The corporation acquired a parcel of land in Penn Forest Township, Carbon County, Pennsylvania which it named Hickory Run Forest. The tract was divided into eleven sections, which were further subdivided into individual lots and offered for sale to the public beginning in 1971. Only sections 1 - 8, sold in reverse order (i.e., sections 7 - 8, 5 - 6 and 1 - 4) are relevant here.

The alleged fraud, which was the major thrust of the Government's case, was that defendants falsely represented that sections 7 - 8 and 1 - 4 were suitable for "on-site septic tank systems which would be approved by the Township of Penn Forest" (A. 8-9).

Despite all of the evidence which it introduced in the course of the ten-day trial, the Government was unable to prove that on-site septic tank systems were unsuitable for any of the lots. Obviously having realized this in advance of trial, it introduced at the outset a new, totally foreign theory that "conventional" on-site (or "on-lot") septic tank systems were unsuitable. Despite the serious confusion engendered by the introduction of this ill-defined concept (each witness defined "conventional" in a different way), the Government was still unable to show any fraud.

The Pennsylvania Department of Environmental Resources ("DER") was charged with administering development of community

and individual sewage disposal systems within the state, under the Pennsylvania Sewage Facilities Act. Before any on-lot sewage system could be installed, a permit was required. Under the Sewage Facilities Act and the regulations promulgated thereunder, all applications were to be made to the township. The regulations also provided that certain types of on-lot systems should not be installed without prior DER approval. Ultimately defining "conventional" systems as those which the township had authority to issue permits for, the Government still failed to show that any lot required a system which the township could not approve.

While the Government claimed that permits for certain types of on-lot systems could not be issued by local authorities, the only basis for this conclusion was informal internal policy of the DER, never promulgated as regulations and without any legal effect. Thus again faced with the prospect of the major focus of its case being dismissed, the Government at the last moment contrived yet another absolutely incredible theory.

Taking two completely unrelated sections of the DER regulations and reading them together, out of context, the Government was able to convince the judge that the regulations did in fact support the DER's informal opinion. This was in marked contrast to the testimony of the Government's chief witness from the DER, Dr. Loughry, who repeatedly admitted that there was no basis in any of the regulations for the Department's position, which only reflected his personal, professional opinion. The jury was then charged as a matter of law that the township could not issue

permits for the lots involved in the 14 remaining fraud counts, and returned the predictable verdict of guilty.

The Government's case on the registration counts was equally weak. It was stipulated that the registration had become effective on August 17, 1972 (Tr. 43, 49). While some sales in sections 1 - 4 had been made prior to that date, the Government's entire case on the registration counts hinged upon whether or not Goldberg was ever advised of the fact that the registration was ineffective prior to August 17.

The only witness against him was Norman Failla, a real estate broker who prepared and filed the statement of record for sections 1 - 4. Failla's testimony was so incredibly weak and contradictory that the judge urged the Government to dismiss all of the counts which depended upon his evidence (Tr. 322). In his appearance before the grand jury, Failla claimed that Goldberg must have known the registration was not effective based on various correspondence from HUD, directed to Failla in care of Pocono. His conclusion rested on the assumption that Goldberg had read the mail. Yet he repeatedly admitted that he had no personal knowledge that Goldberg opened any of the mail from HUD or ever saw the letters.

However, after a series of interviews with the Government which conveniently refreshed his recollection, Failla then testified to conversations in which Goldberg allegedly admitted that he knew the registration was not effective at the time the sales

were made. When pressed, Failla admitted that he "might" have discussed the matter with Goldberg only once, and that he never went into the consequences of an ineffective registration with him.

Obviously aware from the beginning that it had a precariously weak registration case, the Government resorted to the impermissible tactic of presenting massive evidence on the baseless fraud counts, intending that the implications of wrongdoing would be inseparable in the jury's mind from the registration case. The judge perceived this from the outset, urging the Government to avoid confusing the issues with the fraud evidence. However, straining to obtain a conviction at whatever cost and on whatever grounds, the Government nonetheless forged ahead. The desired result was achieved. The spillover from the evidence on the baseless counts clearly took its toll on the jury, which again predictably returned a verdict of guilty on all counts.

For whatever reasons, trial counsel abandoned the registration convictions in two post-trial motions directed solely to the fraud counts (R. 14-15; 20, 22). The judge denied both (R. 18, 26). Goldberg thus stood convicted of a fraud neither alleged nor proven, and convicted of selling unregistered land on the basis of testimony so questionable that it is doubtful if it was sufficient to even go to the jury.

Considering the Government's entire focus on the fraud counts, it is beyond cavil that the jury's impermissible consideration of that evidence was the key to its verdict on the

registration counts. Had the registration counts been tried alone, as they should have been, Goldberg would have been afforded a fair opportunity to defend the only offense legitimately charged. But they were not, and Goldberg was convicted of selling unregistered land on the basis of irrelevant evidence having nothing whatsoever to do with the registration issue.

POINT I

THE FRAUD COUNTS MUST BE DISMISSED BECAUSE THE COURT ERRONEOUSLY PERMITTED A CONSTRUCTIVE AMENDMENT TO THE INDICTMENT

Ever since Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781 (1887), it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. Any other procedure is a direct violation of the Fifth Amendment's guarantee of a trial only on an indictment returned by a grand jury, and not on charges later added by an overzealous or over-eager prosecutor or judge. In Bain, the conviction was reversed because the judge had stricken critical allegations from the indictment, thereby allowing the jury to consider more sweeping allegations than charged in the indictment as drawn.

In Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270 (1960), the court held the indictment was unconstitutionally amended, constructively, when the Government was allowed to offer evidence of a theory of guilt not alleged in the indictment. The crime which the grand jury charged was similarly broadened, leaving it impossible to conclude that Stirone had not been convicted on this impermissibly added charge.

Stirone was charged with unlawful interference with interstate commerce by interfering with the importation of sand and various materials from other states by a manufacturer of concrete. The concrete was used to build a steel manufacturing plant within

the state. The Government was allowed to offer evidence of an effect on interstate commerce not only in sand brought into the state, but also on interference with shipments out of the state from the steel plant. The judge then charged that as far as the interstate commerce aspects of the case were concerned, Stirone's guilt could rest on a finding that either (1) sand used to make concrete had been shipped in from another state, or (2) that the concrete was used for constructing a steel mill which would manufacture steel to be shipped in interstate commerce to other states.

The Supreme Court reversed the conviction, elucidating its reasoning as follows:

> The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. [Citations omitted] While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. [Citation omitted] The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy

> to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosection for interference with interstate commerce which the grand jury did not charge. 361 U.S. at 217-218, 80 S.Ct. at 273-274 (Emphasis supplied)

Speaking to the issue again in Russell v. U.S., 369 U.S. 749, 82 S.Ct. 1038, the Court reaffirmed its previous holdings:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment be [sic] a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. * * * Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. Ex parte Bain, supra, 121 U.S. at 10, 13, 7 S.Ct. at 786; 369 U.S. at 770-771, 82 S.Ct. at 1050-1051 (Emphasis supplied)

In a sweeping opinion analyzing the abuses often found in encroaching upon the grand jury's functions and the accused's rights, Judge J. Skelley Wright explored the significance of Stirone in Gaither v. U.S., 413 F.2d 1061 (D.C. Cir. 1969):

> Because the leading amendment case of Ex parte Bain rested explicitly upon the Constitution, and because it apparently excludes any notion of a non-prejudicial amendment to the indictment, the concept of harmless error has not been applied to amendments. However, the strictness of this rule, perhaps inconsistent with present notions of efficient administration of justice, has been avoided by a simple expedient. Rather than amend the terms of an indictment, a prosecutor simply proves the facts which the amended indictment would have charged. Thus instead of an amendment, there is a variance. And the accepted rule is that a variance does not call for dismissal of the indictment except upon a showing of prejudice.
>
> The Stirone case limited the use of this device. 413 F.2d at 1072 (Emphasis supplied)

In all of its decisions, said Judge Wright, "the Supreme Court has shown that it takes seriously, and requires to be enforced, the Fifth Amendment's command that a defendant to a charge of 'infamous crime' be tried only on an indictment of a Grand Jury." Gaither, supra, 413 F.2d at 1067. "This policy is effectuated by preventing the prosecution from modifying the theory and evidence upon which the indictment is based." U.S. v. Silverman, 430 F.2d 106, 110 (2nd Cir. 1970), cert. denied, 402 U.S. 953. Nor can these crucial safeguards be waived, for "the error [is] to a basic and fundamental right of the appellant." U.S. v. Beard, 436 F.2d 1084, 1086 (5th Cir. 1971).

Here precisely that abuse perceived in Gaither took place. The fraud on which the grand jury indicted is clearly set forth in the key charging paragraph of the indictment (A. 8-9):

> 12. It was a further part of the scheme that the defendants, and their agents, would and did make the following false and fraudulent pretense, representations and promise that purchasers of lots in the Hickory Run Forest development would be able to dispose of human and household sewage and waste by constructing on-site septic tank systems which would be approved by the Township of Penn Forest.

In response to defendants' request for further clarification of the charge, the Government's scanty bill of particulars (R. 4) repeats the same allegations. Yet by the time of trial, obviously realizing it could not prove the crime alleged,[8] the Government subtly but effectively shifted its strategy. Beginning in its opening statement (Tr. 1-13, 1-14-15) and continuing throughout the case, the Government sought to establish that "conventional" on-site septic tank systems were unsuitable.[9]

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[8] See Point II, infra. The unequivocal testimony of each of the Government's witnesses was that on-site systems were suitable and could be accommodated to each and every lot in the entire subdivision.

[9] Although "conventional" systems are referred to in the "Introduction" to the indictment (¶4-5, A.6), the "Introduction" is not part of the crime charged. Analysis of the indictment as a whole makes this clear. It is carefully drawn to exclude these paragraphs from the sole allegations of the fraud in ¶12. The fraud charges are incorporated by reference in each of the counts, but the reference in each instance is to ¶12, and to ¶12 alone. Moreover, the introductory paragraphs themselves are inherently confusing and interminably inconsistent. Paragraph 4 refers to "conventional" systems which are unsuitable because of seasonal high water tables, slow permeability and shallowness and stoniness of soil conditions. Yet ¶5 refers to the term only in connection with seasonal high water tables where subsurface systems purportedly will not work. It is thus not even clear what the "introduction" means when speaking of "conventional."

As requested by the Government, the Court charged this added theory, and this theory alone, as the fraud alleged. Setting the tone of the charge, the Court's first reference to the issue fully embraces the Government's theory and a thorough reading of the entire charge reveals it repeated throughout:

> In general, it is charged that that mail fraud scheme consisted of two parts. In the first part of the scheme, it is contended that the defendants knowingly made false representations, that the building lots which Pocono was selling were suitable for conventional septic tank systems to treat sewage and household wastes when in fact some of the land was not suitable for septic tanks with conventional systems for the disposal of the effluents, and would not be entitled to receive locally issued permits from the town of Penn Forest. (A. 48)

Reference to the property report (A. 156)[10] crystallizes what occurred. Not once does the word "conventional" appear anywhere in the entire document. It states, correctly, only that septic tank systems are suitable and acceptable under applicable health regulations. No representations were made concerning conventional or non-conventional systems. That concept was set up by the Government as a straw man, which it then tried to knock down. The Government postulated a representation that was never made, and then sought, unsuccessfully,[11] to prove it false. Nor is there any evidence that the words used have any special connotation or that they are a term of art with a particular meaning.

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[10] The property report is identical for all sections. Accordingly, for simplicity, only one has been reproduced in the Appendix.

[11] See Point II, infra.

Indeed, it is perfectly clear that criminal liability cannot be fastened upon anything other than the ordinary, everyday meaning of the words used.

It is plain that just the opposite occurred here. Introducing the theory of conventionality, and so charging the jury, impermissibly broadened the allegations of the indictment, depriving defendants of their rights guaranteed under the Fifth Amendment to be tried on the charges presented by the grand jury, and only those charges.

While the Government in summation avoided direct reference to its bogus theory of the fraud, the judge did not. He fully charged the theory of conventionality, and no other. Under these circumstances, the verdict carnot be allowed to stand. In contrast to Stirone, where there was but a possibility that the jury could have convicted on the theory added by the Government, here it is nothing less than certain that it did so, for this was the only theory before it.

In yet another, equally serious violation of defendants' rights, the Government was again allowed to amend the indictment in introducing proof of use of the means of interstate commerce other than the mails on the land fraud counts. Mailing, however, was the only use alleged in the indictment.

Although the Land Sales Act is jurisdictionally broader than the mail fraud statute, allowing the Government to show use of any of the means of interstate commerce, the land fraud counts

are specifically limited to alleging use of the mails only. The same mailing of each purchaser's deed and/or check,[12] on the same date, is the sole use of interstate commerce alleged. Each of those counts is identical in form, save for the name of the purchaser and date of mailing.[13] See, e.g., A. 11-12:

> On or about the 18th day of July, 1972, and continuing up until the date of this indictment, the defendants, both of whom were then and at all pertinent times mentioned herein developers as defined in 15 U.S.C. § 1701(4) did, within the Southern District of New York, directly and indirectly make use of means and instruments of transportation and communication in interstate commerce and of the mails, to wit: a Deed was mailed from the State of Pennsylvania to the State of New York, to sell, offer and cause to be sold a Lot described as Lot 25, Sections 1 - 4, Hickory Run Forest. . . . (Emphasis supplied)

In a pre-trial motion (R. 5-7) defendants sought to have the Government elect between the mail and land fraud counts because they were multiplicitous and confusing. Although the judge denied the motion on the opening day of trial (Tr. 11-12), from

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[12] The fraud counts which went to the jury only involved mailing of a deed.

[13] Although the "Introduction" to the indictment tracks the language of § 1703(a)(1) of the Land Sales Act, this is again plainly not part of any count nor any of the charing portions of the indictment. The language of each count, alleging as it does direct and indirect use of the "means and instruments of transportation and communication in interstate commerce and of the mails," points to only one set of facts or use of commerce in each case: "to wit: a Deed was mailed . . ." To conclude from this that anything other than mailing is charged is impossible.

the outset he urged the Government to make the election specifically to avoid confusing the jury.[14]

Refusing to concede the judge's concern, the Government then elicited evidence of other uses of interstate commerce from the purchasers. At the close of the Government's case, the judge again urged in the strongest terms that prosecutional discretion be exercised and an election made, which was again ignored (Tr. 1111-1111a).

The judge then charged that if the jury convicted on the mail fraud counts, it must consider other uses of interstate com-

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[14] At the opening of the trial the judge expressed concern lest the jury be confused and misled by a myriad of complexity and detail on the fraud issue which was irrelevant to the core of the case (Tr. 12). Despite the Government's assurances that the major thrust of its case would be "the unsuitability of the land for on-lot or septic tank sewage disposal" (Tr. 13), it then proceeded to focus its case precisely on the irrelevant and uncharged conventionality theory. Over half of the recorded evidence is devoted to that issue, and the jury heard five days of testimony devoted in large measure solely to whether or not conventional systems would work in Hickory Run Forest.

When the judge additionally urged that the Government drop those counts in which it would not be able to produce the purchasers, the prosecutor readily replied that every purchaser had been "extremely cooperative" and there would be no problem in having all testify (Tr. 12). Part way through the trial a similar representation was again made (Tr. 207). Ultimately, however, only six purchasers testified (there was a stipulation as to a seventh). Only at the end of the case, when the harm had already occurred and the confusion was firmly fixed in the jury's mind, did the Government finally dismiss the remaining 18 counts which bloated the indictment (Tr. 1091-1092, 1095).

merce on the land fraud counts (A.77). The redacted indictment (A. 187) given to the jury only added to the confusion.[15] It contained, verbatim, all of the charging language that the mails were the sole means of interstate commerce employed in furtherance of the alleged land fraud. It is inconceivable that this failed to leave the jury hopelessly confused, precisely as the Government intended.

Thus, once again the Government was impermissibly allowed to broaden the indictment, and the jury directed that it could only convict on the land fraud counts on a theory never charged in the indictment. Since the verdict was guilty on all fraud counts, it is clear that the Government once again succeeded in unconstitutionally infringing defendants' rights.

The error in this case is precisely that which the court condemned in Stirone. Through the Government's studied shift on theories, defendants were denied the fundamental right to be tried only upon an indictment of a grand jury, and were instead

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[15] This version of the indictment supplied to the jury was simply the original version with some of the stricken counts blocked out and others merely crossed out with light pen marks. In some instances what had been crossed out was still visible under the markings. The judge had also made comments in the margin, which were similarly crossed out, imperfectly. The numbers of all of the original counts were left intact, as were all of the original page numbers although at one point two pages were excluded (pp. 11-12) and at another point, four (pp. 18-21). Since the indictment was not retyped nor the counts renumbered, it was readily apparent to the jury that 42 separate crimes were charged, although the Government was forced to dismiss 21 of the counts when it either failed to produce purchasers, or conceded there was no evidence to support the charge.

tried on the indictment of the prosecutors. This Circuit has viewed the Bain rule as applicable where "the judge's charge [has] allowed or required proof of elements not charged in the indictment," U.S. v. Silverman, supra, 430 F.2d 106, 112 (2nd Cir. 1970), and has most recently interpreted the Supreme Court in Stirone as chiefly "express[ing] concern only with the addition of charging language, rather than its deletion." U.S. v. Cirami, 510 F.2d 69, 72-73 (2nd Cir. 1975). There can be no doubt that what occurred here was the addition of not one, but two, charging theories. Convictions on the prosecutors' or judge's view of the case cannot stand where they depart from the crime charged by the grand jury.

POINT II

THE FRAUD COUNTS MUST BE DISMISSED AS TO GOLDBERG BECAUSE THE EVIDENCE FAILS TO SHOW HE MADE ANY FALSE REPRESENTATIONS

The one point that is clearly visible through the fog of testimony obscuring the fraud issue is the absolute lack of evidence that any representation made by Goldberg was false. Although initially insisting that a conviction might rest on representations in the statement of record as well as the property report, the Government conceded at the very last moment that Goldberg could only be convicted on the basis of any representations in the latter which it could prove false (A. 116). A thorough review of the record reveals that it did not do so.

Section 10(b) of the property report (A. 156), entitled "Sewage Disposal," states simply that septic tanks will be satisfactory for sewage disposal, with slight modification in the disposal field used in same circumstances:

> Sewage disposal is provided by septic tanks to be constructed by the buyer. . . . Developer has been advised by its consulting engineer that such method of sewage disposal is acceptable for the subdivision under current state and local health regulations. Developer has also been advised that in some instances additional corrective work in the form of construction of a sand filter bed may be necessary to permit installation of a septic tank.

It then goes on to discuss the question of necessary permits:

> Prior to installation of septic tanks or other on-lot sewage disposal systems, a permit must be obtained from local authori-

> ties. Buyer should determine the availability of such a permit for his lot from such authorities.
>
> The developer has obtained a letter from the Penn Forest Township Supervisors that the use of septic tanks and other on-lot sewage disposal facilities will be approved for use in Hickory Run Forest subdivision upon issuance of a permit.

The indictment alleges in the most cursory terms that these statements were false because purchasers "would [not] be able to dispose of human and household sewage and waste by constructing on-site septic tank systems which would be approved by the Township of Penn Forest" (A. 8-9).

Far from merely showing insufficient evidence that any false representations were made, the evidence affirmatively reveals that sewage disposal systems as described were suitable for each and every lot at Hickory Run Forest. Moreover, while it is highly doubtful that it can be said that any unconditional representations were made that permits would be issued, the evidence reveals that the town could issue permits for all lots, and fails to reveal any instance in which a permit was refused.[16]

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[16] It is also questionable whether there was even sufficient evidence of the materiality of the representations to go to the jury. However, when counsel made a post charge request that the court additionally charge that materiality was in issue (A. 110), the court responded by asking: "Who would put anything in there if it wasn't material? How can you possibly say it is not material?" (A. 111-112) Counsel ultimately relented, and withdrew his request (A. 117).

A. Construction of On-Site Septic Tank Systems Was Feasible And An Acceptable Method of Sewage Disposal For All Lots

There is no dispute that an on-lot sewage disposal system is any type of system built on a lot for treating and disposing of household waste on that lot (Tr. 413). There is equally no dispute that a "septic tank system" consists of two basic components. There is the septic tank itself into which the raw sewage is deposited and a disposal field which disperses the remaining liquid after the solids settle to the bottom of the tank (Tr. 515-516; 553-554). When reference is made to a "septic tank system," the common understanding is a disposal system using a septic tank as the first component and one of several differing disposal fields as the second (Tr. 554). Various disposal fields which can be used include a tile field, seepage bed, serial distribution and a sand filter (Tr. 516). A sand filter can either be subsurface or above ground. In the latter case, it is referred to as a "turkey mound" (Tr. 516-517), which is used to elevate the disposal system where there is a high water table. Separation from the water level necessary to prevent contamination is thereby maintained (Tr. 767-768).

Each and every one of the Government's witnesses testified that using a standard septic tank, a "septic tank system" could be installed to dispose of sewage in conformity with applicable health regulations by adjusting or changing the type of disposal field accompanying it. Michel, Pocono's engineer, repeatedly reaffirmed that on-site systems would work on each lot (Tr. 413, 416, 520, 556-557). Depending on the site conditions, by using

a tile field, seepage bed, serial distribution, or by increasing the size of the disposal field or using multiple or alternate fields, an acceptable septic tank system could be installed (Tr. 558).

Dr. Loughry, Chief of the Soils Science Unit of DER, for 21 years the Pennsylvania state soil scientist for the U.S. Department of Agriculture who supervised the making of soil surveys for the entire state, and who later reviewed soil studies in Carbon County and prepared interpretations of them for the DER and the public (Tr. 677-680), testified to the same effect in great detail. Loughry explained that dealing only with a septic tank, special soil conditions can be accounted for and taken care of, consonant with the applicable laws, rules and regulations, by modifying, adjusting or re-designing the disposal end of the system (Tr. 761). A disposal field can be designed to compensate for the shallowness of the soil (Tr. 763), slow permeability (Tr. 765), sloping soil conditions (Tr. 765) and fast percolation of the effluent through the soil (Tr. 766-767).

Limitations which exist on varying lots because of soil conditions can in fact be accommodated in all circumstances by adjusting the disposal field, as long as basic separation from the seasonal high water table is maintained (Tr. 761). This problem, too, can be dealt with by using a standard septic tank and installing an aboveground sand filter (turkey mound) (Tr. 767-768).

Faced with the prospect of this testimony from its own

witnesses, there is little reason to speculate as to the Government's purpose in shifting to the theory that "conventional" septic tank systems were unfeasible. Obviously, it would be unable to prove the fraud alleged in the indictment. So, overly anxious to win a "very important case" which it felt of "great importance to the public" (Tr. 1-16, 1213), and reluctant to delay its prosecution by having to go back to the grand jury and seek a new indictment, the case was presented on the only theory available. But, careful scrutiny of the Government's new theory reveals that there, too, it failed to prove any misrepresentations were made by Goldberg. Turn and shift as it might, as the evidence unfolded each new tack proved unsuccessful despite the Government's persistent efforts to evolve during the trial itself a theory -- any theory -- on which it could send the fraud counts to the jury.

Barrelling ahead in its determined efforts to secure a conviction, on whatever grounds, the Government displayed a series of witnesses who testified that while "septic tank systems" would work on all lots, "conventional" systems would not. This was not without its problems, for each witness had his own definition of conventional. Michel had several different ones and the judge too had his own idea of what the term meant. Ultimately, after considerable wrangling, it was agreed that "conventional" meant those systems which the township could issue a permit for, as opposed to requiring approval of the DER.

Not without some considerable confusion, the issue was thus focused on whether or not local authorities could issue

permits for the necessary systems. With the Government shift to the theory that Goldberg misrepresented that purchasers would be able to dispose of sewage using "conventional" systems, as defined, it could prevail only upon a showing that septic tank systems which the town could not approve were needed. Even assuming, arguendo, that introduction of this theory did not directly infringe upon Goldberg's Fifth Amendment rights, the Government again failed to prove the representations of the property report false.

B. The Township Could Issue The Required Permits

The Pennsylvania Sewage Facilities Act sets forth a comprehensive scheme for planning and regulation of community and individual sewage systems. The latter is defined as "a single system of piping, tanks or other facilities serving one or two lots." (§ 2[1]) Overall administrative power is vested in the DER (previously known as the Department of Health), including the power to adopt rules, regulations, standards and procedures necessary to carry out the provisions of the Act (§ 3).

Before an individual sewage system is installed or any building constructed which would require such a system, a permit must first be obtained (§ 7[a]). Unless the DER has invoked its powers under § 8, all applications for permits shall be made "to the municipality" (§ 7[b]), which "shall administer the provision of Section 7 of this act [Permits and Inspection] and the standards adopted by the department pursuant thereto . . ." (§ 8[a]).

The only exception is where the DER has determined that a municipality has failed to properly carry out the provisions of the Act, in which case it may take over administration of the Act itself, "provided that no municipality . . . shall voluntarily surrender administration of the provisions of the act" (§ 8[a]). The Regulations spell out the procedure for a DER take-over, requiring written notice to the municipality and providing for a hearing to review the DER's action (Regulations, Ch. 71, § 71.31).

At all relevant times, full authority to issue permits was vested in the township. The question is thus whether by proper administration of § 7 and the regulations adopted by the DER, the township could properly issue permits for "septic tank systems" at Hickory Run Forest.

As events unfolded at trial, it became clear from the Government's own witnesses that the township had unrestricted authority to issue permits for "septic tank systems" with "additional corrective work in the form of construction of a sand filter bed where necessary," all that the property report ever represented. The Government first tried to show that septic tanks using subsurface sand filters were "non conventional," i.e., that they required DER approval. It was readily brought out, however, that while the DER held to the view that subsurface filters required its approval, it had never promulgated any regulations to that effect and its position was solely an informal one, without any legal force or effect.

To determine if the township had authority to issue a permit for a given system, the local enforcement officer had to depend on the published regulations, manuals and guidelines and instructions given by the DER (Tr. 787). While maintaining the position that subsurface sand filters required DER approval, Dr. Loughry conceded that this was his professional opinion, included in instruction given local officials but never spelled out in the Sewage Facilities Act itself or in any of the regulations promulgated by the Department (Tr. 904-906). He reemphasized that his opinion was based not on the regulations, but on informal instructions "presumably" given to local officials by the DER staff (Tr. 906-907). He was unable to state whether any meetings were even held to acquaint professional engineers and others actually engaged in constructing sewage facilities with his position (Tr. 907-908).

Pinning down the applicable regulations, Dr. Loughry pointedly admitted that there was "nothing published with the imprint of regulation" dealing with subsurface sand filters beyond Ch. 71 and 73 of the Regulations (Tr. 913). Section 73.76, "Subsurface Sand Filters," says nothing about DER approval, while other sections of Ch. 73 dealing with disposal fields where the DER meant to reserve the right of approval clearly state so.[17]

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[17] See, e.g., § 73.74, "Seepage P ts." This should not be confused with "Seepage Beds," § 73.75, which were within the systems contemplated at Hickory Run Forest, and which have no approval requirements attached to them.

In fact, all that Dr. Loughry was able to point to as stating his position was a document entitled "Pennsylvania Sewage Facilities Act Manual" (A. 184). A compilation of the Sewage Facilities Act, the regulations, and editorial comment by the DER on the various provisions (Tr. 929), this is the same document which Michel relied on in concluding that the DER should approve subsurface filters (Tr. 563-564; 569-570). As the judge observed, however:

> [T]here is nothing about this to indicate to me that [the Manual] or that statement [concerning subsurface sand filters] has the force of law or that it is based on any statute or regulation or usage of any kind having the force of law, and I must say that is very puzzling. (Tr. 938)

Responding to the court's inquiry whether there was any legislation, published rule or anything similar which was the basis for the Manual's conclusion, Dr. Loughry replied simply that it was "the Department's interpretation" (Tr. 939-940). He had no idea of where the Department got the power to make such a direction beyond the general power to protect "Health and Welfare" (Tr. 940), nor could he point to any authority in the Regulations beyond Ch. 73 which is silent on the subject (Tr. 944).

At this juncture, the court tentatively ruled the Manual inadmissible to show that state approval was required, unless it could be shown that the standards set forth had been duly adopted as regulations by proper publication in the local equivalent of the Federal Register (Tr. 943-945). As the court said:

> I don't see how you can avoid making a showing that there was an adoption and known to the world in the equivalent of the Federal Register that this is an administrative ruling, and that hence it has the force of law.
>
> * * *
>
> [T]here are elements of due process and you can't impose a statewide regulation without either publishing it in the Register or doing something with it to make it like that. (Tr. 944-945)

Dr. Loughry, the expert whose job it was to supervise the regulations and procedures, conceded this could not be shown. After considerable discussion between counsel and the court (Tr. 1096), the Government too conceded it was unable to furnish any basis upon which the Manual could be elevated to the status of a regulation or other legally binding declaration. The court was then prepared to dismiss the fraud allegations relating to issuance of permits as legally insufficient:

> I could not find or I would be required to find no reasonable juror could consider that portion of paragraph 10-B of Exhibit 9-A which is the property report having to do with availability of local permits was false, and only counts which rested on that premise would have to be discussed. (Tr. 1098)

Having thus failed to prove either of the representations in the property report false, the Government turned to yet another theory in a last minute attempt to save the fraud charges. Having failed to show subsurface sand filters required DER approval, it hit instead upon the far-fetched idea that above-

ground sand filters (turkey mounds) required the DER's consent.[18] However, while the regulations do speak of subsurface sand filters (making no mention of DER approval), they are absolutely silent on the question of turkey mounds. Dr. Loughry, of course, maintained his previously unpersuasive position and flatly stated that turkey mounds also required DER approval, on the same authority which proved transparent in the case of subsurface filters (Tr. 930).

Undaunted by this obstacle, the Government took two completely separate sections of the regulations, directed toward separate problems, and pieced them together in a clearly erroneous attempt to stretch for the conclusion it wanted. So tortured is the interpretation that it rests upon only one sentence of the second regulation, wrenched out of context and totally misleading as used.

Chapter 73 of the regulations deals with "Standards for Sewage Disposal Facilities." Subchapter B, "Individual Sewage Disposal Facilities," proceeds logically from the general to the specific. "Overall requirements" are first set out, followed by specific requirements for "Building Sewers," "Septic Tanks," "Aerobic Sewage Treatment Systems," "Distribution Boxes," "Ab-

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[18] Indeed, even had it been able to show the former, no fraud would have been shown (Tr. 1119). The evidence was that each of the six lots involved in the remaining fraud counts which went to the jury required not subsurface filters, but instead turkey mounds (Tr. 1104-1105).

sorption Area Requirements" and finally "Subsurface Leaching Systems."

The Government extracted from the Overall Requirements, § 73.11(e), a provision dealing with high water table problems:

> The maximum elevation of the ground-water table shall be at least four feet below the bottom of the excavation for the leeching area.

Then, turning to an unrelated section dealing with Absorption Area requirements, it found some useful language in § 73.61(a):

> When the percolation rate is over 60 minutes per inch, a subsurface disposal system as described in this chapter shall not be used. Proposed alternate methods shall not be used unless approved by the Department. (Emphasis supplied)

Finding this " further or separate argument" urged by the Government as a "close question" and again as "a very close question," the trial judge held that:

> . . . the Government has satisfied its burden of showing that proposed alternate methods which have been referred to as a turkey mound, where the sand filter bed is not subsurface, do require depth [sic]* approval as contrasted with approval by the township sanatarian; and therefore, those lots with respect to which the proof shows that the water table was within that four foot distance from the soil, would survive a motion to dismiss based on that aspect of it. (Tr. 1099)

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*This is obviously a typographical error and should read "department."

Far from accepting the rationality of the position, for rationality it has not, the judge appeared caught up in Loughry's adamant insistence in his position and yielded to what he thought perhaps should be the law:

> I think that the practical resolution of these regulations stated by Dr. Loughry are not so unreasonable that the Court must rule as a matter of law that the local sanitarian can issue a permit for a turkey mound. (Tr. 1099)

Further confirmation of the judge's understandable, but erroneous, acceptance of the Government's argument is found in later remarks indicating a feeling that there must be some basis for Dr. Loughry's conclusion, and a willingness to accept what was offered:

> You see, it was incredible to me that they would publish this manual containing such a flat direction as that contained in it without having some kind of support for it; but he did say that that was their rule, and the Government has come up with the regulation. (Tr. 1120)

That Loughry said it is the rule is beyond dispute. That the Government found any basis for Loughry's conclusion is beyond belief. As Loughry himself explained, different soil conditions provide different impediments to constructing safe on-site systems. A high water table is one problem. Fast percolation is another. Section 73.11(e) is directed to the former, and § 73.61(a) to the latter. The judge accepted the proffered theory only because of the high water table problem, quite pointedly stating that the proofs failed except as to those six lots

where the alleged fraud involved failure to advise purchasers that a turkey mound might be required (Tr. 1107).

There was no testimony that fast percolation was a problem on any lots with a high water table. To the contrary, Dr. Loughry said quite clearly that those six lots required state approval only because of the water table (Tr. 698-705). Fast percolation has nothing to do with high water tables in general, and had absolutely nothing to do with the water tables on any of the lots in question. To then find that § 73.61(a), dealing with fast percolation, supported the DER's position, is absurd.

Far from merely accepting the Government's theory and presenting it to the jury with this obviously unreconcilable contradiction apparent on its face, over counsel's objection (Tr. 1118-1122), the judge omitted the first sentence of § 73.61(a) and read the two provisions together as if they followed one another logically:

> The maximum elevation of the ground water table shall be at least four feet below the bottom of the excavation of the leaching area. Rock formations and impervious strata shall be at a depth greater than four feet below the bottom of the excavation. Proposed alternate methods other than a subsurface disposal system shall not be used unless approved by the Department of Environmental Resources. (A. 58-59)

Further obscuring the derivation of the two provisions, and firmly setting in the jury's mind the idea that DER approval was required, the charge on this key point was directly mislead-

ing. The judge referred to § 73.11 as entitled "General, Overall Requirements" and followed by referring to § 73.61 as entitled "General," without indicating that the latter is in the section dealing with "Absorption Area Requirements" (A. 58-59). He then charged, as a matter of law, that turkey mounds required DER approval (A. 59).

Thus, adding to its double shift in theories during trial, the Government contrived a completely untenable construction of plain, unambiguous regulations which, as written, had nothing to do with either theory. Successfully convincing the judge to accept this retroactive interpretation, the Government finally achieved its objective -- a conviction at all costs without regard to any of the constitutional guaranties of a fair trial. The conclusion that the fraud convictions must be dismissed is inescapable.

POINT III

THE FRAUD COUNTS MUST BE DISMISSED AS TO GOLDBERG BECAUSE THE REGULATIONS AS CONSTRUED WERE UNCONSTITUTIONAL FOR FAILURE TO GIVE FAIR WARNING OF THE CRIME CHARGED

Due process imposes certain well-established limitations beyond which a legislature may not go in enacting a criminal statute. Under the "Void for Vagueness" doctrine, it has been repeatedly held that where a statute fails to give fair warning of the offense for which a defendant is convicted, the conviction

cannot be upheld. See Amsterdam, Note, 109 U.Pa.L.Rev.67. As the court explained in Goguen v. Smith, 471 F.2d 88, 94 (1st Cir. 1972), aff'd U.S. , 94 S.Ct. 1242 (1974):

> First, and perhaps the essence of the due process clause of the Fourteenth Amendment, is the rule that all persons "are entitled to be informed as to what the state commands or forbids." Papachristou, supra, 405 U.S. at 162, 92 S.Ct. at 843. This fundamental requirement is such that a "conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process." Wright v. Georgia, 373 U.S. 284, 293, 83.

This principle is no less applicable where, as here, the conviction is based on regulations equally unsusceptible on their face to the interpretation later given them. It would be literally impossible for anyone reading Chapter 73 of the DER Regulations to conclude, as the court did, that state approval was required for above-ground sand filters. "[S]uch reasoning is too tortured and too far removed from reality to satisfy the due process requirement that, at the time of an alleged offense, the accused shall have been on notice that his conduct was proscribed by the state's criminal law." United States ex rel. Clark v. Anderson, 502 F.2d 1080, 1082 (3rd Cir. 1974)

In Clark, the defendant had been convicted under a Delaware embezzlement statute. Although the trial court held the statute void for vagueness, it refused to dismiss the indictments. Instead, the state's revival principle was applied. Under that theory, a new statute was held to merely amend its

predecessor, which was revived or reinstated in place of the later enactment held unconstitutional. As the court said, "such speculative anticipation of a series of future judicial rulings is not the stuff out of which adequate notice can be fashioned." Clark, supra, 502 F.2d at 1083.

The constitutional infirmity here goes beyond the usual situation where fair warning is absent. While it is conceivable, though purely speculative, that the DER intended to enact the regulation which the court found, it plainly did not do so. While it is equally conceivable, and equally speculative, that a court would interpret the existing regulations to prohibit the conduct in question, none had previously done so. Sustaining the conviction on the basis of such a retroactive, unforeseeable interpretation of the regulations, clearly violates due process. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697 (1964).

In Bouie, defendants were charged with criminal trespass under a statute which made it illegal to enter onto the lands of another after notice prohibiting the same. However, no notice was posted at the time the entry took place. Rather, after defendants were on the premises a "no trespassing" sign was put up and they were asked to leave. The South Carolina Supreme Court affirmed the convictions, construing the statute to cover not only the act of entry after receiving notice not to enter, but also the act of remaining on the premises after receiving notice to leave. Because this was a retroactive interpretation of the statute, which gave absolutely no warning that it could be held

to cover the additional crime of remaining after a request to leave, the United States Supreme Court reversed. Responding to the argument that the vagueness doctrine applied only to vague or over-broad language in the statute itself, the court explained that the deprivation of constitutional rights was even greater where the statute was narrow and precise on its face:

> The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in Lanzetta, or to "guess at [the statute's] meaning and differ as to its application," as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.
>
> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. 378 U.S. at 352, 84 S.Ct. at 1701-1702. (Emphasis supplied)

Both of the regulations which were strung together in this case are equally narrow and precise. Taken in context, each refers quite specifically to a different problem and the appropriate solution to each. Wrenching them out of context, and reading only the second sentence of the latter to reach the conclusion which the judge did, is an act of mental gymnastics. No one could be expected to anticipate this. Far beyond denying fair warning, there was no warning whatsoever that anyone could have perceived, other than a prosecutor bent on saving a baseless case. As the court said in Bouie, supra, 378 U.S. at 353, 84 S.Ct. at 1702, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . . ."

POINT IV

BOTH THE FRAUD AND REGISTRATION COUNTS MUST BE REVERSED AS TO GOLDBERG BECAUSE THE COURT'S CHARGE WAS CONFUSING, SERIOUSLY MISLEADING, AND ERRONEOUS

The Supreme Court has often emphasized that a criminal conviction should not rest on equivocal instructions to the jury on a basic issue, nor should it be misleading. Bollenbach v. U.S., 326 U.S. 607, 66 S.Ct. 402. A conviction must be reversed where instructions "hopelessly muddle" the issues presented to the jury. U.S. v. Christmann, 298 F.2d 651 (2nd Cir. 1962). Similarly, a conviction based on confusing instructions to the jury on the basic issue cannot be sustained. See Yates v. U.S.,

354 U.S. 298, 327, 77 S.Ct. 1064, 1081 (1957):

> [T]he very subtlety of these distinctions required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges against these petitioners. The need for precise and understandable instructions on this issue is further emphasized by the equivocal character of the evidence in this record . . .

Even where the court's conflicting instructions are unintentional, but "merely succeeded in confusing the jury," the conviction must be reversed. United States v. Pronger, 287 F.2d 498 (7th Cir. 1961).

At various points throughout the charge, the judge gave instructions which, taken together, muddled the issues and could not have failed to confuse even the most astute and attentive jury.

Although the judge announced he would refrain from giving any personal opinion, the jury may well have inferred the contrary from remarks such as the one made when he referred to the mail fraud statute as the law "which establishes the crime charged," just prior to reading that statute (A. 51).

In charging on the element of knowledge, the judge first defined knowingly, then added the concept of willful and defined knowingly and willfully. However, in the process of refining the concept, knowingly was then included within the definition of willfully. The element of unlawful was added,

and the judge wound up re-defining a third phrase, knowingly, willfully and unlawfully (A. 61). Shortly afterwards, he then singled out Goldberg alone on the key issue of knowledge, excluding the corporate defendant, by repeated references to "the" defendant and use of the words "he," "his" and "him" (A. 65-66).

In a particularly obscure discussion of the suitability of disposal systems, the only issue in the case to which the word "suitability" applies, the judge suddenly injected the issue of availability of permits, stating that it was within "the concept" of unsuitability (A. 67). This was given almost as an afterthought, and not set forth for the jury's consideration as the separate and distinct issue that it was.

In a similar vein, when discussing the land fraud charges, the judge twice referred to certain counts as identical in form to those previously read, without distinguishing between the mail fraud and land fraud counts, both of which had in fact been previously read (A. 96).

With respect to certain fraud counts against the corporation where oral misrepresentations were also alleged, the judge's review of the evidence built up the fraud as a whole to an unwarranted degree, yet failed to refer to the very weakness of the evidence on the other fraud counts against the corporation and against Goldberg (A. 96-99). In view of the demonstrated lack of evidence of either, the instructions were decidedly confusing.

The judge then lapsed into plain error in reading a part of the land fraud statute not charged in the indictment, in direct violation of the rule that "instructions given to the jury in a criminal case should not include, or comment be made on, that part of a statute defining an offense which is not charged in the indictment." Wood v. U.S., 342 F.2d 708, 711-12 (8th Cir. 1965), cert. denied, 385 U.S. 978. In United States v. Bagby, 451 F.2d 920 (9th Cir. 1971), the court relied in part on just such an error in reversing, where the judge implied that the defendant could be convicted under a statute not charged in the indictment:

> [T]he court instructed the jury about a 1956 statute which made all heroin found in the United States "contraband." 18 U.S.C. § 1402. This was immediately followed by a statement that "[t]he defendants are charged * * * with a conspiracy to violate these statutes." (Emphasis added.) This is a completely inaccurate statement and may well have hopelessly confused the jury. No violation of the 1956 statute was charged. 451 F.2d at 928.

In reading the land fraud statute, the judge included that part of § 1703(a)(2)(B) making it an offense to obtain money or property "by means of a material misrepresentation with respect to any information included in the statement of record or property report" (A. 52). (Emphasis supplied) There was never any allegation of misrepresentation with respect to information included in those documents. Rather, the allegation was of misrepresentations in the property report itself. This is covered under the last clause of § 1703(a)(2)(B), which

the judge properly charged. Later, the error was compounded when the judge erroneously charged that the Government relied on false representations in the statement of record (A. 96-97) and then sought to correct this error by a subsequent instruction that there was no evidence that buyers ever saw the statement or could have relied on it (A. 118). In light of the voluminous testimony about the statement of record and the representations in it, the impression left with the jury was, at the least, confusing. This is particularly so where nothing was done to correct the prejudicial inclusion of the uncharged offense in § 1703(a)(2)(B).

In discussing the amount of land which was allegedly unsuitable for on-site systems, the judge again slipped into the error of misleading the jury in a most serious way. Assuming, arguendo, that some of the land was unsuitable, Goldberg's knowledge of the number of lots involved was obviously crucial. Yet the judge failed to give the jury any clear or concise direction on how to evaluate the evidence before it. The Government's position was that "the land as a whole was basically unsuitable" (Tr. 87). However, the judge's openly contradictory statements as to the number of unsuitable lots necessary to establish the requisite knowledge furthered and heightened the confusion already engendered. He instructed the jury that they could find knowledge "if a substantial number" of the lots, acres, or land were unsuitable (A. 59, A. 63, A. 66-67), or that a "major number" of the lots were unsuitable (A. 67). However, he also instructed the jury that they could infer knowledge if they found that only

"some" lots were unsuitable (A. 59, 67). The confusion left in the jury's mind is underscored by the judge's own lack of precision in subsequently dealing with the very same issue, when he referred to "most" of the sites as unsuitable in a post-verdict decision (Memorandum Decision, April 25, 1975, pg. 3; R. 26).

While knowledge is a jury question, it cannot be doubted that the unsuitability of one, or ten, or even twenty lots out of over 700 could not establish fraudulent intent. However, as the judge charged the jury, the possibility cannot be excluded that it might well have followed the erroneous and vague instruction that it could convict if it found defendants knew that "some" of the lots were unsuitable. Cf., McFarland v. U.S., 174 F.2d 538 (D.C. Cir. 1949), where the court gave two conflicting instructions, one of which was clearly prejudicial. As a result, because the jury might well have followed the erroneous instruction, there was no alternative but to reverse. McFarland was convicted of perjury. The issue was whether he had been a resident of the District of Columbia continuously for ten years, as he so testified in a divorce proceeding. Residency for one year was required to obtain a divorce. The judge first charged that one who was domiciled in the District for the required time met the residency requirements. A supplemental instruction, however, told the jury that "the residence required does not necessarily mean the technical, legal domicile, but does mean the locality where the social life of the party is lived. . . ." In a later portion of the charge, the judge again reverted to

domicile, telling the jury that the residence required by the statute was equivalent to domicile. This inconsistency here is equally serious, and equally requires reversal.

Most significant, however, are two crucial instances in which the charge was misleading with regard to both the fraud and registration counts, weaving them together in a web of misunderstanding from which the jury could not escape.

In the beginning of his instructions the judge explained that there were three separate sets of charges against the defendants (A. 50), which he previously referred to as the mail fraud charges, the "HUD charges" and the charges against the corporation for failing to supply a property report (A. 47-50). Without mentioning in any way land fraud, he proceeded to read all of § 1703(a)(1) and § 1703(a)(2)(B) of the Land Sales Act, which he described as the statutory basis for the "balance of the charges in the indictment" (A. 52). As already noted, one of the fraud provisions of § 1703(a)(2)(B) not charged in the indictment was also read. The judge then proceeded to define the elements of mail fraud.

The next reference to three separate sets of charges, twenty-five pages later (A. 75-76), refers not to the charges originally described, but instead to three different violations of Land Sales Act alone: the fraud charges, the registration charges, and the property report charges. Where the judge thus referred first to three separate sets of charges, and then to three separate violations of the Land Sales Act alone, the jury

may well have joined in its mind the HUD charges as a whole without distinguishing between the fraud charges and the registration charges. Considering the entire focus of the case and the charge itself on the fraud issues, it is highly likely that the jury in its confused state impermissibly considered the fraud evidence in connection with all of the charges, including the registration counts.

This serious possibility is reinforced by the judge's misleading response to the jury's last request for further clarification, followed two hours later by its verdict of guilty on all counts. As Mr. Justice Frankfurter noted in Bollenbach, supra, 326 U.S. at 612, 66 S.Ct. at 405, "[p]articularly in a criminal trial, the judge's last word is apt to be the decisive word." This danger is particularly heightened after "a long wrangle in the jury room [which] would leave the jury in a state of frayed nerves and fatigued attention." In response to a request for clarification, "[w]here a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach, supra, 326 U.S. at 612-13, 66 S.Ct. at 405. After a seven-day trial in Bollenbach, the jury had been out seven hours when it returned a note asking for further instructions. The judge's reply, held by the court to be "simply wrong," was followed shortly thereafter by a guilty verdict.

Here, after a ten-day trial, the jury deliberated only six and a half hours before returning the crucial note asking for clarification on the central and most obscure point on the registration issue:

> When was the statement of record for Section 1 to 4 effective after the 13 deficiencies were cleared up? (Tr. 1353)

The judge's reply, technically responsive, nonetheless inevitably added to the very core of the confusion and lacked that most desirable "concrete accuracy."

The very fact that the jury asked the question which it did indicates its confusion on the registration counts. The simple and concise reply would have been to explain that the statement was effective on August 17, 1972 and that any sales thereafter were not violations. As the judge himself earlier recognized, the record shouldn't be tainted by counts relating to sales after the effective date of the registration (Tr. 40). However, he went on at some length to explain that the deficiency letters were evidence that both Pocono and HUD were operating under a misapprehension and believed the statement ineffective until October 3, 1973 (Tr. 1353-54).

This explanation is in direct conflict with the theories under which the deficiency letters were admitted, either as evidence that Goldberg acknowledged that he had known the registration to be ineffective prior to August 17 when discussing the letters with Failla (Tr. 129-130), or as circumstantial evidence of scienter and knowledge <u>on the fraud issues</u> (Tr. 82, 84). While arguably correct in allowing admission of the letters for the limited purpose of showing Goldberg's knowledge, it is doubtful that even this relevance outweighs the obvious prejudice of allowing them in. Far from scrupulously seeking to

counter-balance that prejudice with clear instructions, the judge left it undiminished and, indeed, reinforced its obvious impact on the jury. The significance of that impact is revealed no more plainly than in the jury's prompt conclusion of its deliberations with a guilty verdict immediately thereafter (Tr. 1354-55).

POINT V

THE REGISTRATION COUNTS MUST BE REVERSED AS TO GOLDBERG BECAUSE THE EVIDENCE IS SO PALPABLY WEAK THE CONVICTION CAN ONLY REST ON IMPERMISSIBLE INFERENCES OF WRONGDOING DRAWN FROM THE BASELESS FRAUD CHARGES WHICH THE GOVERNMENT FAILED TO PROVE

A. The registration evidence was so weak as to be nearly insufficient to go to the jury

The sole evidence of Goldberg's knowledge that sales were made prior to the effective date of the statement of record was the testimony of Failla, who prepared and filed the statement of record for sections 1 - 4 (Tr. 273).[19] Failla's testimony throughout the trial is best summarized in the words of the judge himself, who was outraged at his conduct:

> . . . because the way that fellow flip-flops in what he says, this is one of the more disgraceful witnesses it's been my privilege to enjoy in my short career here; but the way he goes, he is all over the lot, . . . (Tr. 320)

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[19] Failla was a real estate broker licensed in New York who held himself out as qualified to prepare registration statements for HUD as well as other similar local filings required to sell in New York and New Jersey (Tr. 100).

Perhaps inadvertently caught up in the Government's zeal to obtain a conviction, the judge refused a specific post-charge request (A. 104) for additional instructions on the conflicts in Failla's testimony. Yet, he did so instruct the jury with regard to the witness Michel (A. 62-63) whose testimony dealt solely with the fraud issues, and the jury specifically asked for a re-reading of that testimony (Tr. 1345, 1348).[20] With regard to Failla, the judge stated that he recalled no conflicts in his testimony that were "truly material in anyone's view of this case (A. 104), and again that he did not remember any "truly significant conflicts" (A. 105). He felt that there were merely "some trivial differences with Failla" (A. 105).

When counsel pointed out that there were also conflicts between Failla's courtroom and grand jury testimony (A. 106), the judge again rejected the requested charge, declining to make any further instructions concerning any conflicts in Failla's testimony (A. 107). This in marked contrast to his own observations when Failla was on the stand:

> I see some substantial inconsistencies and evasiveness in his grand jury testimony, and I see some inconsistencies between these telephone conversations . . . I think the [recordings of telephone conversations which defense counsel used to refresh Failla's recollection] are inconsistent with the grand jury testimony, and I think with some parts of the direct testimony in this trial. (Tr. 323-324)
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[20] Those parts of Michel's grand jury testimony read are the second, seventh, eighth and ninth excerpts referred to at Tr. 1348.

> The man is vacillating between one position and another in this grand jury testimony; . . . He is a fellow who likes to give an unresponsive answer, and he did; but he has said so, and again in the same testimony he's said the contrary. (Tr. 325)

Failla's incredible testimony, coming within inches of being insufficient to even go to the jury, is so weak and confusing that it is doubtful the jury would have convicted had the registration counts not been presented as an inseparable part of the fraud issue.

The entire tenor of Failla's testimony was clear from the outset, when he first denied ever talking to Elliott Taikeff, trial counsel, about what he had told Goldberg (Tr. 151). Two pages later he admitted that such conversations had in fact taken place (Tr. 153).

During a period of several weeks prior to the trial, Failla was interviewed by the Government six or seven times (Tr. 156-157). After his first or second interview, in a telephone conversation with Taikeff, Failla stated that as far as he was concerned Goldberg did not know the registration was ineffective. The only way Goldberg could have known, Failla said, was if he had read the mailings from HUD, addressed to Failla in care of Pocono. But Failla readily conceded that he had no personal knowledge that Goldberg had ever seen the letters (Tr. 307-308). In fact, he never received any indications whatsoever, oral or written, that Goldberg ever saw <u>any</u> correspondence from HUD (Tr. 310). In a later telephone conversation

with Taikeff, Failla revealingly admitted that he told the Government that "there is a strong indication that [Goldberg] never saw this material" (Tr. 311-312, 317). Throughout the entire trial, in fact, there was no testimony that Goldberg saw any of the correspondence.

The same palpable weakness and glaring inconsistencies appear in Failla's grand jury testimony. He testified before the grand jury that Goldberg knew the registration was ineffective because he received all correspondence from HUD. He must, therefore, have read the letters and realized what they were about, because he forwarded copies to Failla (Tr. 279-281). Yet Failla then admitted that he was merely assuming that Goldberg opened the correspondence and saw the letters (Tr. 301), and he never knew for a fact that Goldberg ever saw any of the documents.

During his initial conversation with Taikeff, Failla also said that he told the Government that he had "discussed" the fact that the registration was not effective with Goldberg (Tr. 157). At trial he testified to repeated conversations with Goldberg concerning the effectiveness of the registration. Later, however, Failla admitted that he "may have mentioned it once or twice" (Tr. 185-186). Still later, the supposed conversations were narrowed further when Failla conceded that he discussed the matter with Goldberg "maybe once" (Tr. 190). However, he could not recall ever going into the consequences of a failure to file:

> I will say I never did mention the consequences, what would happen if we didn't have an effective statement of record to Mr. Goldberg. (Tr. 186)

What had occurred was readily apparent. Failla testified that throughout his interviews with the Government, the significance of testimony that he had told Goldberg the registration was ineffective had been pressed home to him. This was a "very important aspect" of the case (Tr. 169-170). The Government repeatedly kept going back to that one key question -- whether Goldberg deliberately went ahead and sold knowing he did not have an effective registration (Tr. 311).

Failla had last spoken with Taikeff three weeks before trial, after his first or second interview with the Government (Tr. 154, 156). The subsequent five interviews ensued (Tr. 156-157). These latter meetings had apparently quite conveniently refreshed Failla's recollection about conversations with Goldberg nearly two years in the past (Tr. 167-168). Incredibly, however, at trial he was unable to recall what he told Taikeff in conversations shortly before (Tr. 164-165).

Following his interviews with the Government, with his recollection thus refreshed, Failla testified that he told Goldberg that until the deficiencies were corrected they did not have an effective statement of record (Tr. 146). Yet even then, in the very next breath, he contradicted himself by admitting that he had not told Goldberg the filing was ineffective (Tr. 147).

Failla also testified that he told Goldberg in substance that sections 1 - 4 "were not valid for sale through HUD" until they received a letter of effectiveness (Tr. 148). Yet he again contradicted himself, admitting that he never advised Goldberg or anyone else to stop selling because of the supposed ineffective registration (Tr. 202-203). Nor did he ever give Goldberg or Pocono a specific warning that selling should cease until the registration was effective because it was a violation of the law. The Government, on re-cross the following day, after further preparing Failla the preceding evening (Tr. 369-370), tried to provide him with an escape path. Testimony was elicited that Failla's duties involved preparing registrations and filings, but were not connected with the sales end of the operation (Tr. 379-383). Yet registration is obviously for one purpose, and one purpose alone -- to allow sales to proceed. Indeed, it taxes credulity to even suggest that the two are mutually exclusive. The fact remains that Failla repeatedly testified both that he had not told Goldberg sections 1 - 4 were not available for sale, and that he had told him.

Failla's flip-flopping and evasiveness must also be viewed against the background of circumstances which brought him to the witness stand for the Government. He had been advised by the Government, among others, that he would be "called down" as partially to blame for Goldberg's predicament (Tr. 180). He admitted serious concern that he would be blamed and held responsible for any failure to secure an effective registration (Tr. 176-178), although denying that his failure to so advise

Goldberg would have been a professional error (Tr. 181). Continuing in his usual vein, two pages later he admitted that as the broker with sole responsibilities for making the filings on sections 1 - 4, any failure to advise his clients of the true state of affairs would have been at least a "professional oversight" (Tr. 183).

Far from exhibiting "minor inconsistencies," as the judge chose to characterize this testimony in refusing the requested charge, Failla was indeed "one of the more disgraceful witnesses" ever to cross the portals of a courtroom. Judge Wyzanski, in a charge that must stand as the very model of clarity, explained to the jury the criteria which Mr. Justice Brandeis often applied in evaluating the credibility of a witness:

> Mr. Brandeis said that if he wanted to think about whether to believe a witness he would inquire as to, first, what were his opportunities for observation? Second, what was his capacity for recollection? Third, what was his capacity for narration, for telling the story afterwards? And, fourth, and in Mr. Brandeis' opinion most important, what was the witness' ability to understand the relation of his particular piece of testimony to the case as a whole?
>
> I would like to add a fifth, although it is a little presumptuous to add anything to what Mr. Brandeis said. I think it is very important to inquire as to motivation or bias, and to see whether the witness has really shown the capacity to overcome the kind of bias that unfortunately every human being is subject to, some more, some less. U.S. v. Interstate Engineering Corporation, 288 F.Supp. 402, 415 (D.N.H. 1967)

Failla's testimony fails to meet not one, but all of

Justice Brandeis' standards. Whatever opportunities Failla may have had for observation, he plainly failed to see virtually everything that was clearly before his face. His capacity for recollection was nil and his capacity for narration non-existent, as he amply demonstrated time and time again. He equally demonstrated a total inability to understand the relation of any particular piece of testimony, his or anyone else's, to the case as a whole. As to Judge Wysanski's own, fifth criterion, Failla amply revealed a continuing inability to overcome his bias and motivation to protect his professional reputation, such as it was.

B. The verdict was tained by the fraud evidence

Equally serious, independent considerations require reversal of the registration convictions. From the outset it was clear that the Government knew it had no case of fraud, but nonetheless joined those counts with the registration counts to present impermissible cumulative testimony of purported wrongdoing. It obviously had the intended impact on the jury. Manifest prejudice resulted from combination of the baseless fraud counts, which were concededly the prime focus and "major thrust of the Government's case" (Tr. 13), with the registration counts.

The dangers inherent in such multiplicitous pleadings, where the jury may well infer guilt of one crime from evidence of another, are well catalogued. As a leading commentator has remarked, 8 Moore's Federal Practice, ¶8.02[1] (Second Ed.):

> The way in which the prosecutor chooses to combine offenses or defendants in a single indictment is perhaps second in importance only to his decision to prosecute. Whether a defendant is tried en masse with many other participants in an alleged crime, or in a separate trial of his own, will often be decisive of the outcome. Equally decisive may be the number of offenses which are cumulated against a single defendant. . . .
>
> * * *
>
> Trial convenience in criminal procedure is not a goal on which all parties can uniformly agree. In liberal joinder the convenience is usually that of the prosecution -- not simply convenience in presentation of proof, but convenience in obtaining convictions as well. Few will deny that there is a positive correlation between the number of defendants and offenses cumulated within a single trial, and the likelihood of conviction. (Emphasis supplied)

The record amply demonstrates the Government's major focus on the fraud case (approximately 600 of the 1100 pages of testimony, plus the bulk of the 100-page charge, are devoted to this point) and the effective impact of the spillover on the jury is readily apparent. As the Supreme Court observed in Pierce v. U.S., 314 U.S. 306, 310, 62 S.Ct. 237, 239 (1941):

> So closely entwined were the TVA and the Government (The United States) in the instructions and the evidence on the various counts that any jury might well have thought a pretense that Pierce was an employee or officer of the TVA violated the statute and have voted for conviction for that reason. This, however, in our view, is incorrect, and constitutes prejudicial error [because the crime charged was impersonating an officer of the Government, not an independent body such as the TVA].

The confusion which the judge perceived at the outset and urged the Government to avoid readily took its toll. One of the jury's first requests for clarification is illuminating. Obviously in a quandry on the very issue of knowledge, it asked if facts known to Pocono could be imputed to Goldberg (Tr. 1339). As the judge readily perceived, the jury was understandably confused over the concept of implied knowledge as to the corporation, and was beginning to wonder whether it might equally apply to Goldberg (Tr. 1337). The verdict strongly suggests that it did indeed apply the concept equally to Goldberg, exactly as the Government intended it to do.

The exhibits and testimony called for by the jury further demonstrate its concentration on the fraud issues. Each of its six notes asking for further clarification requested exhibits and testimony dealing almost exclusively with the fraud.[21] The very exhibits called for are themselves confusing and complicated in their references to the ambiguous and ill-defined term "conventional" injected by the Government in the case. Similarly, while one of the documents requested (Ex. 38, A. 173) relating to the fraud issue was received in evidence only as to

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21 The jury asked (Tr. 1335-1336) for Government's Exhibits 32A, 34, 38 and 60 (A. 157, 159, 173 and 175), and Defendants' Exhibits B, D (A. 181 and 182) and T through Z (various permits issued for on-lot systems); virtually all of the documents supplied to purchasers at the time of sale (Tr. 1348-1349); a purchaser's testimony concerning representations about septic tanks (Tr. 1347); and those portions of Michel's testimony relating to the fraud allegations (Tr. 1345).

the corporation (Tr. 1067-1069), the judge failed to give any limiting or cautionary instructions when delivering it to the jury. Even more significantly, one of the most confusing and prejudicial of the exhibits delivered to the jury (Ex. 34, A. 159) had never even been admitted into evidence! Equally confusing, and equally prejudicial, all of the statements of record which the jury requested (Tr. 1335-1336) contained innumerable pages with either "void" markings or diagonal lines drawn across them, furthering the impression of misconduct or wrongdoing. The charge itself, of course, which also focused primarily on the fraud allegations, was equally confusing and misleading (see Point IV, supra).

The record was thus artfully developed to demonstrate Goldberg's culpability in general. It equally forced him into a position where he was unable to take the stand on the crucial registration counts. The fraud issue was complex, technical and involved a myriad of statutes and regulations which Goldberg knew nothing about. The prospect of cross-examination on vast areas which he himself was confused about was undoubtedly instrumental in counsel's decision not to have him testify.[22] Direct testimony from Goldberg that Failla never told him about the registration problems would have sharply focused the key

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[22] Indeed, this was probably also a major reason for counsel's decision to rest after the Government's case was completed and not put on any defense whatsoever.

issue for the jury. Where virtually every other sentence spoken by Failla contradicted both his prior and subsequent testimony, so contriving to deny Goldberg his constitutional right to take the stand in his own defense is unconscionable.

C. Assuming, arguendo, that the registration counts are not reversed, appellate consideration of the sentence is appropriate

Considering the case as it developed as a whole, and dismissing the fraud counts against Goldberg as the Court must, the situation is ripe for appellate analysis of the registration sentence. Assuming, arguendo, that the registration convictions are not reversed as they should be, a direction to the trial court to reconsider the sentence imposed is appropriate. Indeed, it may well be more appropriate to remand for resentencing before a different judge, in light of the trial court's feelings towards the case as described below.

Appellate courts are not without power to look into the propriety of the sentence. See U.S. v. Wiley, 278 F.2d 500 (7th Cir. 1960); Leach v. U.S., 334 F.2d 945 (D.C. Cir. 1964); U.S. v. Daniels, 446 F.2d 967 (6th Cir. 1971); U.S. v. Mitchell, 392 F.2d 214, 217 (2nd Cir. 1968) (concurring opinion of Kaufman, C.J.), cert. denied, 386 U.S. 972; Tateo v. U.S., 377 U.S. 446, 475, n. 5, 84 S.Ct. 1587, 1594 (1964) (Goldberg, J., dissenting). Subjective considerations in the mind of the sentencing court are of course beyond observation. Yet the judge's remarks on the materials before him at sentencing plainly declare that the

fraud convictions and the cumulative weight of the entire case entered into the registration sentence.

An appellate court's powers in such a situation were lucidly explained by Chief Judge Bazelon, as follows:

> [T]he appellate court must scrutinize the sentencing process to insure that the trial judge has considered the information available with some regard for its reliability, and has evaluated the information in light of the factors relevant to sentencing. Scott v. U.S., 419 F.2d 264, 266 (D.C. Cir. 1969)

Under these circumstances, reduction of the sentence is an appropriate consideration, as the Supreme Court suggested in Yates v. U.S., 356 U.S. 363, 366-367, 78 S.Ct. 766, 768-769 (1958):

> [W]hen this Court found that only a single offense was committed by petitioner, and not eleven offenses, it chose not to reduce the sentence but to leave this task, with gentle intimations of the necessity for such action, to the District Court. However, when in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court.

The judge's remarks in sentencing Goldberg on the registration counts leave no doubt that the fraud counts entered prominently into his consideration:

> Now, this Co[illegible] would not be disturbed with respect to most of these counts having to do with the turkey mound or the question of the property report and its wording. Taken alone, I would not consider that this defendant was a proper subject for a prison sentence in spite of his prior record but having regard to his favorable standing in the community.
>
> However, certain of these counts, particularly the counts of selling this unregistered land, do present a brazen violation of the legal requirements to register land for sale before dealing in it and these particular counts in the indictment cause the greatest problem or difficulty for the Court; on these particular counts I must reach the conclusion that your conduct is inexcusable and totally wilful and motivated by greed, by a desire to get a hold of these purchasers in a hurry and get their money and effectuate the sale to them without complying with the statute requiring the filing with the Housing and Urban Development . . . (A. 143-144) (Emphasis supplied)

The remarks last quoted above in particular speak the language of fraud, when the judge refers to "greed" as motivating Goldberg's desire to proceed with sales. The fraud convictions must be reversed. The evidence in the registration counts is precariously weak. Obviously, then, the sentence on the registration counts, which clearly took the fraud convictions into consideration, must be modified.

An additional factor is the Government's allegation at sentencing, unproven and on which no evidence was offered, of later purported misconduct by Goldberg after trial in failing to cooperate fully in testifying before a subsequent grand jury (A. 136-137).

Again, it cannot be said that this allegation did not enter into the judge's mind in imposing sentence. If proven, or if at least substantiated by some evidence which would make the charges susceptible of belief, such conduct might properly have been considered. But there was no such evidence. To the contrary, the Government deliberately waited until the last moment to raise the issue at all, first bringing its allegations to the judge's attention only at the time of sentencing (A. 138-139). Although the judge stated that he was excluding these allegations in his mind, his telling reference to Goldberg as "a cooperator, but a late cooperator" (A. 140; emphasis supplied) suggests the contrary.

The strong possibility of a due process violation thus remain, where the sentence may well have been based in part on acts or offenses Goldberg was not convicted for, nor even tried for. An analogous situation motivated the Fourth Circuit to specifically single out the sentence in remanding to the district court, with directions to reconsider the sentence with a view toward its reduction:

> When the District Judge passed sentence, he was of course aware of the episode in which some of the defendants had become involved since the trial over which he presided. In fixing sentence he certainly was not obliged to ignore the later event. Subsequent misconduct has evidentiary value in determining the period of confinement anticipated to be required to effect the purposes of the sentence. Yet it is true that he could sentence only for the offense of which the defendants had been convicted, for if he undertook to penalize them for the other

offense as well, it would run afoul of due process, if not double jeopardy. State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 462, 67 S.Ct. 374, 94 L.Ed. 422 (1947); Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). Precisely what passed through the judge's mind is purely speculative and we have no reason to think that the judge undertook to impose a penalty for the second offense. However, we consider it fair and in the interest of justice in this instance to remand the case to the District Court for further consideration of the sentences, and the judge may determine in his discretion whether the sentences should be reduced in the light of our statement of the law, or for any other reason for which the judge may reduce sentences under Rule 35, Fed.R.Crim.P. U.S. v. Eberhardt, 417 F.2d 1009, 1015 (4th Cir. 1969), cert. den., 397 U.S. 909. (Emphasis supplied)

CONCLUSION

For all of the foregoing reasons the fraud counts must be dismissed as to Goldberg, and as to Pocono. The registration counts must also be reversed as to Goldberg. The evidence is plainly so weak that these convictions can only rest on impermissible inferences of wrongdoing drawn from the baseless fraud charges which the Government failed to prove. The spillover of that evidence plainly tainted the jury's verdict. Assuming, arguendo, that the registration counts are not reversed the Court should remaind with directions to reconsider the sentence and reduce it accordingly, preferably to a different judge.

Respectfully submitted,

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ADDENDUM

Title 18 United States Code § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other articles, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.

Title 15 United States Code § 1703

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

(b) Any contract or agreement for the purchase or leasing of a lot in a subdivision covered by this chapter, where the property report has not been given to the purchaser in advance or at the time of his signing, shall be voidable at the option of the purchaser. A purchaser may revoke such contract or agreement within forty-eight hours, where he has received the property report less than forty-eight hours before he signed the contract or agreement, and the contract or agreement shall so provide, except that the contract or agreement may stipulate that the foregoing revocation authority shall not apply in the case of a purchaser who (1) has received the property report and inspected the lot to be purchased or leased in advance of signing the contract or agreement, and (2) acknowledges by his signature that he has made such inspection and has read and understood such report.

Pub.L. 90-448, Title XIV, § 1404, Aug. 1, 1968, 82 Stat. 591.

[Subpart (b), not involved in this case, has since been amended. This version of § 1703 is as it appeared at the time of the indictment.]

PENNSYLVANIA

SEWAGE FACILITIES ACT

(as amended)

DEPARTMENT OF ENVIRONMENTAL RESOURCES
BUREAU OF COMMUNITY ENVIRONMENTAL CONTROL
DIVISION OF COMMUNITY ENVIRONMENTAL SERVICES
SEWAGE FACILITIES SECTION

MARCH 1970

R-BCE-534P

No. 537

AN ACT

Providing for the planning and regulation of community and individual and community sewage disposal systems; requiring municipalities to submit plans for systems in their jurisdiction; authorizing grants to municipalities; requiring permits for persons installing such systems; authorizing the Department of Health to adopt rules, regulations, standards and procedures; creating an advisory committee; providing remedies and prescribing penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. *Short Title.* - This act shall be known and may be cited as the "Pennsylvania Sewage Facilities Act."

Section 2. *Definitions.* - As used in this act:

(1) *"Individual sewage system"* means a single system of piping, tanks or other facilities serving one or two lots and collecting and disposing of sewage in whole or in part into the soil of the property or into any waters of this Commonwealth.

(2) *"Community sewerage system"* means any system, whether publicly or privately owned, for the collection and disposal of sewage or industrial wastes of a liquid nature, or both, including various devices for the treatment of such sewage or industrial wastes serving three or more individual lots.

(3) *"Municipality"* means a city, town, township, or borough, or any combination thereof acting cooperatively or jointly.

(4) *"Subdivision"* means the division of a single tract or other parcel of land, or a part thereof, into three or more lots, and shall also include changes in street lines or lot lines.

(5) *"Lot"* means a part of a subdivision or a parcel of land used as a building site or intended to be used for building purposes, whether immediate or future, which would not be further subdivided.

(6) *"Official plan for sewerage systems"* means a comprehensive plan for the provision of adequate sewerage systems adopted by a municipality or municipalities possessing authority to provide or jurisdiction over the provision of such systems and submitted to and approved by the State Department of Health as provided herein.

(7) *"Department"* means the Department of Health of the Commonwealth of Pennsylvania.

(8) *"Sewage"* means any substance that contains any of the waste products or excrement or other discharge from the bodies of human beings or animals and any noxious or deleterious substances being harmful or inimical to the public health, or to animal or aquatic life, or to the use of water for domestic water supply or for recreation.

(9) *"Secretary"* means the Secretary of Health of the Commonwealth of Pennsylvania.

(10) *"Person"* shall include any individual, copartnership, association or private corporation.

(11) *"Realty improvement"* means any proposed new residence or other building, the useful occupancy of which will require the installation or erection of a sewage disposal system other than one which is to be served by a community water supply and a community sewage system.

(12) *"Advisory committee"* means the special committee created by the provisions of this act.

(13) *"Rural residence"* means a structure occupied or intended to be occupied by not more than two families on a tract of land of ten acres or more.

Section 3. *Rules, Regulations, Standards and Procedures.* - The department shall have the power and its duties shall be to adopt such rules, regulations, standards and procedures as shall be necessary to enable it to carry out the provisions of this act, to wit: adoption of standards for construction and installation of community individual and community sewage disposal systems and standards for construction, installation and maintenance of community sewage treatment plants, requirements for disbursement of State and Federal funds to municipalities for planning, personnel and construction of water supply and sewage disposal systems, and review and acceptance of official plans.

Section 4. *Advisory Committee.* - An advisory committee shall be appointed within three months of the passage of this act and biennially thereafter, membership of which shall be composed of one representative from the following organizations, the name of said representative to be submitted to the secretary within ten days of receipt of request for same: Pennsylvania State Association of Township Supervisors, Pennsylvania State Association of Boroughs, Pennsylvania League of Cities, Pennsylvania State Association of Township Commissioners, Pennsylvania Association of County Commissioners, Pennsylvania Association of Plumbing Contractors, Inc., Pennsylvania Society of Professional Engineers, Mortgage Banker's Association, Pennsylvania Home Builders Association, Pennsylvania Society of Architects, County Health Departments, Federal Housing Administration, Bureau of Community Development, Pennsylvania State University, Pennsylvania Municipal Authorities Association, Pennsylvania Section of the American Water Works Association, National Water Companies Conference, Water Pollution Association of Pennsylvania, and such other organizations having a direct interest in the area of water and sewage as the secretary deems necessary.

The advisory committee shall be responsible for annual review of the implementation of the provisions of this act, review and recommendation of rules, regulations, standards and procedures adopted by the department pursuant to this act.

The recommendations of the advisory committee shall be submitted to the secretary who shall give due consideration to the same.

Section 5. *Official Plans*

(a) Each municipality shall submit to the department an officially adopted plan for sewerage systems serving areas within its jurisdiction within such reasonable period as the department may prescribe, and shall from time to time submit revisions of such plan as may be necessary.

(b) When more than one municipality has authority over sewerage systems within an area, the required plan or any revision thereof may be submitted jointly by the municipalities concerned or jointly by one or more of the municipalities with the concurrence of the others.

(c) Every official plan, and any revision thereof, shall delineate areas in which community sewerage systems are now in existence, areas where community sewage disposal systems are planned to be available within a ten year period and areas where community sewage disposal systems are not planned to be available within a ten year period.

(d) Every official plan shall:

(1) Provide for the orderly extension of community interceptor sewers in a manner consistent with the needs and plans of the whole area, provided that this section shall not be construed to limit the development of such community facilities at an accelerated rate different than that set forth in the official plan;

(2) Provide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste;

(3) Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practicable precision those portions of the area which community systems may reasonably be expected to serve within ten years, after ten years, and any area in which the provision of such services is not reasonably foreseeable;

(4) Take into consideration any existing State plan affecting the development, use and protection of water resources;

(5) Establish procedures for delineating and acquiring a time schedule consistent with that established in clause (3) of this subsection necessary rights-of-way or easements for community systems;

(6) Set forth a time schedule and proposed methods of financing the construction and operation of the planned community systems, together with the estimated cost thereof;

(7) Be reviewed by appropriate official planning agencies within a municipality, including a planning agency with areawide jurisdiction if one exists, for consistency with programs of planning for the area, and all such reviews shall be transmitted to the department with the proposed plans; and

(8) Include provision for periodic revision of the plan.

(e) The department is hereby authorized to approve or disapprove official plans for sewerage systems submitted in accordance with this act within one year of date of submission.

(f) The department is authorized to provide technical assistance to counties, municipalities and authorities in coordinating official plans for sewerage systems required by this act, including revisions of such plans.

(g) For purposes of this act, the department is authorized to cooperate with all appropriate Federal, State, interstate, and local units of government, and with appropriate private organizations.

Section 6. *Grants Authorized* - The department is authorized to administer grants to counties, municipalities and authorities to assist them in preparing official plans for sewerage systems required by this act, and for carrying out related studies, surveys, investigations, inquiries, research and analyses. Such grants shall be made from funds appropriated by the General Assembly for this purpose and shall equal one-half the cost of preparing such plans. Such grants shall not be withheld from any municipality which is complying with the terms of this act. For the purposes of this section, costs shall be exclusive of those reimbursed or paid by grants from the Federal government.

Section 7. *Permits and Inspection.*

(a) No person shall install an individual or community sewage disposal system or construct any building for which an individual or community sewage disposal system is to be installed without first obtaining a permit indicating that the site and the plans and specifications of such system are in compliance with the provisions of this act and the standards adopted pursuant to this act. No permit shall be required by the department, county department of health, joint county department of health, joint municipal department of health, municipality, joint township department of health or township in those cases where a permit from the Sanitary Water Board or the secretary has been obtained, or where the department determines that such permit is not necessary for the protection of the public health or for a rural residence.

(b) Application for permit shall be in writing to the municipality, county department of health, joint county department of health, or to the department in accordance with the provisions of section 8 of this act, and shall be made on a formal application blank, and each application shall include such data as shall be prescribed by said technical standards for construction.

(c) Permits shall be issued or denied within seven days after receiving an application for permit except that, in case the municipality, county department of health, joint county department of health, or the department in accordance with the provisions of section 8 of this act, finds the data submitted by an applicant incomplete, the time for acting thereon shall be extended seven days beyond the date of submission of adequate supplementary or amendatory data. Denial of permit shall be supported by a statement in writing of the reasons for such action.

(d) No system or structure designed to provide individual or community sewage disposal to any realty improvement shall be covered from view until approval to cover the same has been given by the body which issued the original permit or its authorized representative. If forty-eight hours have elapsed, excepting Sundays and holidays, since the body issuing the permit receive notification of completion of construction, the applicant may cover said system or structure unless permission has been refused by the issuing body.

(e) In case any permit is denied or revoked, a hearing shall be held thereon before the municipality, county department of health, joint county department of health, or the department in accordance with the provisions of section 8 of this act, within fifteen days after request therefor is made by the applicant. Within seven days following the date of such hearing, the applicant shall be notified in writing of the determination of said hearing.

(f) If the municipality, county department of health, joint county department of health, or the department in accordance with the provisions of section 8 of this act, determines that any change has occurred in the physical conditions of any lands of a realty improvement which will materially affect the operation of the community or individual sewage disposal system covered by any permit issued under section 7 of this act, the permit shall be revoked and a new permit shall be obtained before construction shall proceed.

(g) The municipality, county department of health, joint county department of health, or the department in accordance with the provisions of section 8 of this act, shall have the power to make, or cause to be made, such inspections and tests as may be necessary to carry out the provisions of section 7 of this act and its authorized representatives shall have the right to enter upon lands for said purposes. In making said inspections in second class townships the supervisors may be appointed as inspectors and their compensation as inspectors shall be fixed by the township auditors.

Section 8. *Administrative Provisions.*

(a) All municipalities shall administer the provisions of section 7 of this act and the standards adopted by the department pursuant thereto except that the provisions of section 7 of this act shall not apply to any municipality which is subject to jurisdiction of a county or joint county department of health.

County or joint county departments of health shall administer the provisions of section 7 of this act in the area subject to their jurisdiction. Each municipality or county or joint county department of health administering the provisions of section 7 of this act shall submit to the department such reports as the department shall require.

Whenever a municipality, county department of health or joint county department of health shall fail to administer the provisions of section 7 of this act in conformity with the standards of the department and thereby permit and allow conditions inimical to the public health to occur, the department shall administer the provisions of section 7 of this act in such municipality, county department of health or joint county department of health, provided that no municipality, county department of health or joint county department of health shall voluntarily surrender administration of the provisions of this act.

In accordance with the provisions of this section, the department shall adopt the necessary procedures to effect the transfer of administration from municipalities, county or joint county departments of health to the department.

(b) Copies of any ordinances, which are adopted by any municipality or county or joint county department of health establishing requirements equivalent to those required by section 7 of this act and minimum standards for construction equivalent to those promulgated or to be promulgated by the Secretary of Health of the Commonwealth under section 7 of this act, shall be filed with the department within thirty days after their adoption, or in the case of existing ordinances within thirty days of the effective date of this act.

(c) Municipalities, county or joint county departments of health shall not adopt any standards or promulgate any regulations or procedures not in conformity with the standards, regulations or procedures of the department, and any regulations, ordinances and standards presently in existence shall be superseded by regulations and standards adopted by the department.

Section 9. *Reimbursement to Municipalities.* - Municipalities complying with the provisions of this act in a manner deemed satisfactory by the secretary shall be reimbursed annually by the department from funds specifically appropriated for such purpose equal to one-half of the cost of the expenses incurred by the municipalities in the enforcement of the provisions of this act.

Section 10. *Saving Clause.* - Nothing in this act shall be deemed to affect, modify, amend or repeal any provisions of the act of June 22, 1937 (P. L. 1987), as amended, or to affect the powers and duties of the Sanitary Water Board.

Section 11. *Restraining Violations.* - Any municipality or county or joint county department of health administering the provisions of section 7 of this act shall have the power to institute in the court of common pleas of the county in which it is situated, a proceeding to restrain violations of section 7 of this act.

When the department is responsible for enforcement of the provisions of this act in accordance with the provisions of this act, the Attorney General at the request of the secretary shall have the power to institute in the Court of Common Pleas of Dauphin County an action against any person violating the provisions of section 7 of this act, to restrain said violation. For this purpose the said Court of Common Pleas of Dauphin County is vested with jurisdiction to hear, determine and adjudicate such matter and grant such relief as is necessary and appropriate.

Section 12. *Penalty.* - Any person who shall violate any of the provisions of this act or the rules, regulations or standards promulgated thereunder or who resists or interferes with any officer, agent or employe of a municipality or county or joint county department of health or the department, in accordance with the provisions of this act, in the performance of his duties, shall upon conviction thereof in a summary proceeding before any justice of the peace, alderman or magistrate in the county in which the offense was committed, be sentenced to pay a fine of not less than one hundred dollars ($100) and costs, and not more than three hundred dollars ($300) and costs, to be paid to said county, or in default thereof, shall be confined in the county jail for a period of not more than thirty days.

Section 12.1. *Appeals.*

(a) Any person aggrieved by an action of a municipality, department of health or joint county department of health may, within thirty days after such action, appeal to the Secretary of Health who shall personally or by his disignee hear the appeal in accordance with the provisions of the act of June 4, 1945 (P. L. 1388), known as the "Administrative Agency Law."

(b) All actions of the department whether under subsection (a) of this section or under any other provision of this act, shall be taken subject to the right of notice, hearing adjudication, and the right of appeal therefrom, in accordance with the provisions of the act of June 4, 1945 (P. L. 1388), known as the "Administrative Agency Law."

Section 13. *Severability Clause.* - The provisions of this act are severable and if any provision or part thereof shall be held invalid or unconstitutional or inapplicable to any person or circumstances, such invalidity, unconstitutionality or inapplicability shall not affect or impair the remaining provisions of the act.

Section 14. *Repealer.* - All acts or parts thereof inconsistent with the provisions of this act are repealed.

Section 15. *Effective Date.* - This act shall take effect January 1, 1968: Provided, That any municipality which shall enforce this act in a manner deemed satisfactory to the secretary shall receive reimbursement as provided in section 9 for expenses incurred after July 1, 1967: And provided further, That after July 1, 1967 the department is authorized to administer grants to any county, municipality or authority pursuant to section 6.

Approved--The 24th day of January, A. D. 1966.

WILLIAM W. SCRANTON

Act No. 151 of October 5, 1967, amended section 15.

Act No. 177 of July 16, 1968, amended clause (1) of section 2 and subsections (a) and (g) of section 7 and added section 12.1.

Act No. 43 of March 4, 1970, amended clause (1) of section 2 and subsection (a) of section 7 and added clause (13) of section 2.

TITLE 25. RULES AND REGULATIONS
PART I. DEPARTMENT OF ENVIRONMENTAL RESOURCES
Subpart C. PROTECTION OF NATURAL RESOURCES
ARTICLE I. LAND RESOURCES

CHAPTER 71. ADMINISTRATION OF SEWAGE FACILITIES ACT

Authority

The provisions of this Chapter 71 issued under act of January 24, 1966, P.L. 1535, § 3, (35 P.S. § 750.3).

Source

The provisions of this Chapter 71 adopted August 2, 1971.

GENERAL

§ 71.1. Definitions.

The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) *Act* - The Pennsylvania Sewage Facilities Act (35 P.S. § 750.1 *et seq.*).

(2) *Approving body* - A municipality, county department of health, joint county department of health, or the Department, whichever is administering the provisions of the act in the area where a sewage or sewerage system is to be installed.

(3) *Building sewer* - Piping carrying liquid wastes from a building to the treatment tank.

(4) *Department* - The Department of Environmental Resources of the Commonwealth.

(5) *Disposal field* - An area in which open joint or perforated piping is laid in covered trenches or excavations for the purpose of distributing the liquid from the treatment tank into the soil.

(6) *Industrial wastes* - Liquid wastes resulting from the processes employed in industrial and commercial establishments.

(7) *Seepage pits* - A covered pit with open-jointed lining through which the liquid from the treatment tank may seep or leach into the soil.

(8) *Treatment tank* - A water-tight tank designed to retain sewage solids long enough for satisfactory bacterial decomposition of the solids to take place. It includes septic tanks and aeration type tanks.

(i) *Septic tank* - A watertight receptacle which receives sewage or industrial waste and is designed and constructed to provide for sludge storage, sludge decomposition, separate solids from the liquid through a period of detention before allowing the liquid to be discharged.

(ii) *Aerobic sewage treatment tank* - Any unit incorporating, as a part of the treatment process, a means of introducing air into the sewage held in a storage tank or tanks so as to provide aerobic biochemical stabilization during a detention period.

(9) *Waters of this Commonwealth* - Any and all rivers, streams, creeks, rivulets, lakes, dammed water, ponds, springs and all other bodies of surface and underground water, or any of their parts, whether natural or artificial, within or on the boundaries of this Commonwealth.

§ 71.2. Scope.

The provisions of this Chapter are adopted in accordance with the duties imposed

upon the Department under the act and shall apply to all municipalities, county departments of health and joint county departments of health administering the act as well as to all persons installing individual sewage systems or community sewerage systems as defined in the act.

OFFICIAL PLANS

§ 71.11. General requirement.

Official plans shall be submitted to the Department by or for municipalities in accordance with the act and § § 71.12 - 71.16 and 73.91 - 73.95 of this Title (relating to official plans).

§ 71.12. Time of submission.

(a) Each municipality shall be assigned a priority by the Department for the submission of official plans for sewage disposal. A minimum notice of 12 months shall be given by the Department to each municipality to submit its official plan within one of the following time limits:

(1) *Priority A.* Official plans due July 1, 1968.

(2) *Priority B.* Official plans due January 1, 1969.

(3) *Priority C.* Official plans due July 1, 1969.

(b) The priority system for the submission of plans is based on the following factors:

(1) Distribution and density of population, and present and future population trends.

(2) Current and anticipated pattern and direction of urban growth.

(3) Topography, including rivers, mountains and other natural features.

(4) Other environmental health factors which may have a relationship to sewage plan, such as pollution of water resources and vector breeding.

(c) Official plans or their revisions may be submitted prior to the time limit prescribed in subsection (a) of this section.

(d) The Department may extend the time limit for the submission of official plans, provided the municipality has submitted a written request for an extension based on good cause.

§ 71.13. Method of submission.

(a) Each municipality shall submit to the Department, within the time limit prescribed in § 71.12 of this Title (relating to time of submission) a completed official plan which has been adopted by the municipality, containing the information required by the act and this Chapter.

(b) Two or more municipalities may submit jointly a single official plan. The plan may be prepared by one of the designated municipalities and submitted on behalf of all participating municipalities provided that such plan is adopted by each municipality to which it relates and certification of such adoption accompanies the plan when submitted to the Department for approval.

(c) When two or more municipalities are preparing a joint plan and have different priorities for submission of plans, the plan shall be submitted in accordance with the first priority municipality.

§ 71.14. Contents of plan.

The official plan shall include a text, map and analysis and shall, in addition to the requirements of the act, set forth the following:

(1) Areas where community sewerage systems are now in existence, with an evaluation of their potential for expansion to service areas which are unsewered.

(2) Areas where community sewerage systems are planned to be in operation

within a ten-year period, and the location of the major elements of these new systems.

(3) An evaluation of soils in terms of their capability for on-lot disposal of sewage in those areas of the municipality where public sewerage systems do not exist.

(4) Other environmental health factors which may have a relationship to the sewage plan, such as pollution of water resources and vector breeding.

§ 71.15. Approval of plans.

(a) No plan shall be approved by the Department unless it contains the information required by the act and the provisions of this Chapter.

(b) Within 60 days after submission of the official plan the Department shall either approve or disapprove the plan.

(1) If the Department has not disapproved an official plan within 60 days of its submission, the official plan shall be deemed to have been approved, unless the Department and municipality stipulate an extension of time.

(2) The provisions of this section shall apply also to amendments and revisions submitted in accordance with the act or the provisions of this Chapter.

(c) In the event the official plan is disapproved by the Department, written notice shall be given to each municipality included in the plan, together with a statement of reasons for such disapproval.

(1) Any municipality shall, upon submitting a written request within ten days after receipt of notice of disapproval, be afforded the opportunity for a hearing before the Secretary of the Department or his designate to set forth its views as to why the plan should be approved.

(2) At the hearing the municipalities may present information and data in addition to that submitted with its official plan, including revisions and amendments.

(3) Upon the basis of evidence presented at the hearing the Department shall, within a reasonable time after the hearing, either affirm, modify or revoke its disapproval of the official plan.

§ 71.16. Changes in approved plans.

When the Department determines that an approved official plan, or any of its parts, is inadequate for the needs of a municipality to which it relates because of changed or newly discovered facts, conditions or circumstances, the Department may upon written notice require an amendment or revision to the plan. No such amendments or revisions shall be required within two years from the date of departmental approval of the official plan or its last amendment, or any revisions thereof.

GRANTS FOR PREPARATION OF OFFICIAL PLANS

§ 71.21. General.

In accordance with section 6 of the act (35 P.S. § 750.6), the Department shall administer grants to municipalities, counties and authorities preparing official plans, as well as amendments and revisions to their plans, to the extent of appropriations made by the General Assembly for that purpose.

§ 71.22. Allocations of funds.

(a) Any municipality, county or authority may request a planning grant.

(b) The Department shall administer grants in accordance with the priority system established under § 71.12 of this Title (relating to time of submission of plans).

§ 71.23. Application for grants.

Applications and instructions for grants shall be supplied by the Department upon written request to the Pennsylvania Department of Environmental Resources, P. O. Box 2351, Harrisburg, Pennsylvania 17120.

§ 71.24. Information supplemental to application.

Completed applications for planning grants shall be accompanied by the following:

(1) A proposed work plan program as required in § § 71.11 - 71.16 of this Title (relating to official plans for sewage disposal).

(2) An analysis of the estimated cost of preparation of plan.

§ 71.25. Approval of grants.

(a) The Department shall review all applications for grants and accompanying data within 30 days upon receipt of the information, and shall notify the municipality, county or authority of its approval or disapproval within 30 days thereafter.

(b) All disapprovals shall contain the reasoning leading to disapproval.

§ 71.26. Conditions of grants.

Grants approved by the Department shall be subject to the following conditions:

(1) Plans shall be completed within the time set forth in the notice from the Department, unless a time extension has been approved by the Department.

(2) Written progress reports shall be submitted to the Department every six months, or more frequently if required.

(3) Upon completion of the official plan, the necessary cost data shall be submitted to the Department.

ADMINISTRATION OF THE ACT

§ 71.31. Transfers to the Department.

Whenever, in accordance with section 8 of the act (35 P.S. § 750.8) the Department administers section 7 of the act (35 P.S. § 750.7), the following procedures shall apply:

(1) The Department shall notify, in writing, the municipality, county department of health, or joint county department of health charged with administering the act that the Department shall administer the act from a date specified in the notice. The notice shall state the manner in which the municipality, county health department or joint county health department has failed to administer the act.

(2) Any municipality, county department of health, or joint county department of health which is affected by such determination of the Department may, within 15 days from receipt of such notification, submit a written request to the Department for a hearing to review the determination of the Department.

(3) A hearing shall be held within 15 days from receipt of a request from the municipality or county health department or joint county health department for a hearing. The Department within 15 days, shall notify in writing the governing body of the municipality, county health department or joint county health department of its decision.

§ 71.32. Transfers from the Department.

(a) In cases where the Department has assumed administration of the act, a municipality, county department of health or joint county department of health desiring to resume administration of the act shall make a written request to the Department.

(b) Thereafter, the Department, upon determining that the municipality, county department of health, or joint county department of health, will administer the act and regulations in a satisfactory manner, shall so notify the body in writing and shall state the effective date of the transfer of administration.

(c) In the absence of such a request, the Department may, when it is satisfied that the organization is capable of administering the act and its regulations in a satisfactory manner, return administration to the municipality, county department of health or joint county department of health.

§ 71.33. Local regulations.

(a) Municipalities, county or joint county departments of health may adopt and enforce ordinances, regulations, procedures or standards which are not inconsistent with the act or the provisions of this Chapter.

(b) Whenever the Department is administering the act in accordance with § 71.31 of this Title (relating to transfer to the Department) the Department shall not be required to assume responsibility for administering or enforcing ordinances, regulations, procedures or standards adopted by such municipality, county or joint county departments of health.

REIMBURSEMENT TO MUNICIPALITIES

§ 71.41. General.

(a) In accordance with section 9 of the act (35 P.S. § 750.9), the Department shall reimburse municipalities for one-half of the expenses incurred in enforcing the provisions of sections 7 and 8 of the act (35 P.S. § § 750.7 - 750.8), as well as the provisions of this Chapter in a manner deemed satisfactory by the Department.

(b) No municipality shall be reimbursed under the provisions of the act unless its enforcement activities are consistent with the terms of the act and the provisions of this Chapter.

§ 71.42. Application for reimbursement.

(a) Application for reimbursement of expenses in accordance with section 9 of the act (35 P.S. § 750.9) shall be made to the Pennsylvania Department of Environmental Resources, P. O. Box 2351, Harrisburg, Pennsylvania 17120.

(b) The applicant shall supply to the Department, information and data contained on an application form supplied by the Department.

(c) Municipalities initially making application for reimbursement shall attach to the application a copy or copies of ordinances, acts, regulations or procedures, if any, used by the municipality in accordance with the act.

(d) All required information shall be submitted in triplicate to the Department not later than March 1, 1968, and annually each succeeding year, not later than January 31.

§ 71.43. Determination of reimbursement rate.

(a) The Department shall reimburse municipalities for one-half of the cost of expenses incurred in the enforcement of the act as provided in section 9 of the act (35 P.S. § 750.9).

(b) Reimbursement shall not exceed a reasonable rate per final inspection as determined by the Department. An itemized statement shall be submitted to the Department showing the following information:

(1) The total of expenses actually incurred and paid, on a cash basis, by the applicant in the performance of the duties imposed upon it by the act.

(2) The total of fees and other money earned, including uncollected fees, by the applicant in the performance of its duties.

(3) The excess of such total expenses over the total of earned fees and other money.

PERMITS AND INSPECTION OF SEWAGE DISPOSAL SYSTEMS

§ 71.51. General requirement.

(a) Permits shall be required for the installation of a new individual sewage system or community sewerage system prior to the construction of any building for which such a system will be installed, and prior to the alteration, repair or extension of an existing sewage disposal system, unless the Department determines in writing that a permit is

not required or necessary in a particular case.

(b) No permit shall be required and none shall be issued by a municipality for a system which is subject to the approval of the Department under other laws or regulations administered by the Department, but such systems shall otherwise be subject to sections 11 and 12 of the act (35 P.S. § § 750.11 - 750.12) and § § 71.51 - 71.57 of this Title (relating to permits and inspection of sewage systems).

§ 71.52. Applications for permits.

(a) *Requirement.* Application for a permit to install an individual or community sewerage system shall be made to the approving body by the person performing or responsible for performing all labor in connection with the installation of the system.

(b) *Contents.* The application form shall require such information as the Department shall deem necessary and shall contain the following information:

(1) Name and address of the applicant.

(2) Description of the real estate upon which the system is to be installed and which the system will serve.

(3) Detailed information showing the absorptive qualities, depth and type of soil involved and the high water level of the groundwater table.

(4) Number and location of private and public water supplies within 100 feet of the proposed system.

(5) Location of and distance to any sewer within one mile.

(6) Such further information as may be required by the approving body to insure the proposed construction, installation, alteration or extension complies with the regulations promulgated by the Department.

§ 71.53. Incomplete applications.

When the approving body has found an application incomplete, the applicant shall be notified in writing within seven days and the time for acting thereon shall be extended seven days beyond the date of receipt of adequate supplementary or amendatory data.

§ 71.54. Issuance of permits.

(a) When the approving body is satisfied the application is complete and the proposed design meets the requirements of this Chapter and the act and will adequately protect the public health, a permit shall be issued.

(b) Permits shall be issued or denied by the approving body in writing within seven days after receiving an application for permit.

§ 71.55. Denial of permits.

A denial of a permit by the approving body shall be for any one or more of the following reasons, which shall be incorporated into the written denial:

(1) Failure of the proposed design to meet the requirements of this Chapter, Chapter 73 of this Title (relating to standards for sewage disposal systems), or the act.

(2) Soil or geological conditions which would preclude safe and proper operation of the desired installation.

(3) Public sewers into which the sewage or other wastes can be feasibly and legally discharged.

(4) Failure of the proposed system to adequately protect the public health.

§ 71.56. Review of denials.

(a) Upon receipt by the applicant of a notice of denial or revocation of a permit, the applicant may request in writing a hearing before the approving body, which shall hold a hearing within 15 days after receipt of such a request.

(b) The applicant may be represented by counsel and may present evidence as to why a permit should be issued or retained at the hearing.

(c) No transcript of testimony shall be required but the applicant shall be notified in writing within seven days after the hearing of the decision and the reasons for continued denial.

§ 71.57. **Inspection.**

(a) No part of any installation shall be covered until it is inspected and given final written approval by the approving body.

(b) The applicant shall notify the approving body when the installation is completed and ready for inspection.

(c) The applicant may cover the installation upon receipt of written approval, or, in the absence of written approval or disapproval, at the expiration of 48 hours, excepting Sundays and holidays, from receipt of notice to inspect.

(d) The approving body may inspect and make tests at any time either before, during or after construction and may by order require an installation to be uncovered at the expense of the applicant, if the installation has been covered contrary to the provisions of this Chapter.

TITLE 25. RULES AND REGULATIONS
PART I. DEPARTMENT OF ENVIRONMENTAL RESOURCES
Subpart C. PROTECTION OF NATURAL RESOURCES
ARTICLE I. LAND RESOURCES

CHAPTER 73. STANDARDS FOR SEWAGE DISPOSAL FACILITIES

Authority

The provisions of this Chapter 73 issued under act of January 24, 1966, P.L. 1535 § 3, (35 P.S. § 750.3).

Source

The provisions of this Chapter 73 adopted August 2, 1971.

Subchapter A. GENERAL PROVISIONS

§ 73.1. Definitions.

The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) *Act* - The Pennsylvania Sewage Facilities Act (35 P.S. § 750.1 *et seq.*).

(2) *Approving body* - A municipality, county department of health, joint county department of health, or the Department of Environmental Resources of the Commonwealth, whichever is administering the provisions of the act in the area where a sewage or sewerage system is to be installed.

(3) *Building sewer* - Piping carrying liquid wastes from a building to the treatment tank.

(4) *Department* - The Department of Environmental Resources of the Commonwealth.

(5) *Disposal field* - An area in which open joint or perforated piping is laid in covered trenches or excavations for the purpose of distributing the liquid from the treatment tank into the soil.

(6) *Industrial Wastes* - Liquid wastes resulting from the processes employed in industrial and commercial establishments.

(7) *Seepage pit* - A covered pit with open-jointed lining through which the liquid from the treatment tank may seep or leach into the soil.

(8) *Treatment tank* - A watertight tank, including septic tanks and aeration type tanks, designed to retain sewage solids long enough for satisfactory bacterial decomposition of the solids to take place.

(i) *Septic tank* - A watertight receptacle which receives sewage or industrial waste and is designed and constructed to provide for sludge storage, sludge decomposition, separate solids from the liquid, through a period of detention before allowing the liquid to be discharged.

(ii) *Aerobic sewage treatment tank* - Any unit incorporating, as a part of the treatment process, a means of introducing air into the sewage held in a storage tank or tanks so as to provide aerobic biochemical stabilization during a detention period.

(9) *Waters of this Commonwealth* - Any and all rivers, streams, creeks, rivulets, lakes, dammed water, ponds, springs and all other bodies of surface and underground water, or any of their parts, whether natural or artificial, within or on the boundaries of this Commonwealth.

§ 73.2. Scope.

(a) The provisions of this Chapter are adopted in accordance with the duties imposed upon the Department under the act and shall apply to all municipalities, county departments of health and joint county departments of health administering the act as well as to all persons installing individual sewage systems or community sewerage systems as defined in the act.

(b) Construction, installation and maintenance of sewage and sewerage systems shall be in accordance with the standards adopted by the Department and included in this Chapter.

§ 73.3. Adoption and revision of standards.

(a) The Department, upon its own recommendation or the recommendation of the Advisory Committee, shall adopt, and from time to time revise, such standards as it deems necessary to prevent nuisances and pollution of the waters of the Commonwealth, including procedures to insure suitability of sewage disposal site and the proper installation and operation of systems.

(b) No person shall install, and no approving body shall issue a permit for or approve, a sewage or sewerage system which violates such standards.

Subchapter B. INDIVIDUAL SEWAGE DISPOSAL FACILITIES

GENERAL

§ 73.11. Overall requirements.

(a) All liquid wastes, including kitchen and laundry wastes, shall be discharged to a treatment tank.

(b) If the effluent is to be discharged to the waters of this Commonwealth a permit shall be obtained from the Department.

(c) Extreme care shall be exercised in the operation of machinery and vehicles during or after installation to prevent damage to the system.

(d) Leaching systems shall not be located in areas which may be paved or subject to use, such as playgrounds, parking lots or other usage, which would cause abnormal compaction of the soil.

(e) The maximum elevation of the groundwater table shall be at least four feet below the bottom of the excavation for the leaching area. Rock formations and impervious strata shall be at a depth greater than four feet below the bottom of the excavation.

(f) The percolation time shall be within the range indicated in § § 73.63 and 73.64 of this Title (relating to absorption area requirements for private residences and multiple dwellings).

§ 73.12. Minimum isolation distances.

(a) Minimum isolation distances shown in subsections (b) and (c) of this section shall be maintained between the sewage disposal system and the features itemized. Where conditions warrant, greater isolation distances may be required.

(b) The following figures shall be minimum isolation distances for septic tanks:

(1) Property line - 10 feet.
(2) Occupied buildings - 10 feet.
(3) Individual water supply - 50 feet.

(c) The following figures shall be minimum isolation distances between the features named and leaching systems:

(1) Individual water supply - 100 feet.
(2) Streams, lakes or other surface water - 50 feet.
(3) Occupied buildings - 10 feet.
(4) Property lines - 10 feet.

§ 73.21. Material.

Building sewers shall be constructed of cast iron, vitrified clay, concrete, asbestos cement, plastic or other durable material acceptable to the Department.

§ 73.22. Size.

All building sewers shall be at least four inches in diameter, except that they shall be at least six inches in diameter when the average daily flow exceeds 1,000 gallons per day.

§ 73.23. Construction.

(a) Cleanouts shall be provided at the junction of the building drain and building sewer and each change in direction of the building sewer.

(b) Cleanouts shall be provided at intervals of not more than 50 feet on lines of four-inch diameter, or 100 feet in larger pipes.

(c) Bends ahead of the septic tank shall be limited to 45° or less where possible. If 90° bends cannot be avoided, they shall be made with two 45° ells.

(d) The grade of the building sewer shall be at least one eighth inch per foot. However, the ten feet of building sewer immediately preceding the septic tank shall not exceed one fourth inch per foot.

(e) All building sewers shall be constructed with watertight joints and shall be of sufficient strength to withstand imposed loads when:

(1) located within 50 feet of an individual water supply;
(2) within five feet of any basement foundation; or
(3) located under driveways with less than three feet earth cover.

SEPTIC TANKS

§ 73.31. Capacity.

(a) The liquid of a septic tank shall be based on the number of bedrooms in the dwelling as shown in the following figures, which also provide for the use of garbage-grinders, automatic washers and other household appliances:

No. of Bedrooms	Minimum Tank Capacity
3 or Less	900 gallons
4	1,000 gallons

(b) For each additional bedroom, 100 gallons of capacity shall be added.

(c) Septic tanks with less than 1,500 gallon capacity serving other than an individual dwelling shall provide a sewage detention period of not less than 24 hours.

(d) Sewage flow shall be computed according to type of establishment and water use as shown in § 73.87 of this Title (relating to sewage flow). When sewage flows are greater than 1,500 gallons per day, the liquid tank capacity shall equal 1,125 gallons plus 75% of the daily anticipated sewage flow.

§ 73.32. Construction.

(a) Tanks shall be watertight and constructed of sound and durable material not subject to excessive corrosion or decay.

(1) Precast concrete tanks shall have a minimum wall thickness of two and one-half inches and be adequately reinforced.

(2) Precast slabs used as covers shall have a thickness of at least three inches and be adequately reinforced.

(3) The interior of tanks constructed of blocks shall be surfaced with two one-fourth inch thick coats of Portland cement-sand plaster.

(4) Steel tanks shall meet United States Department of Commerce Standards 177-62.

(b) The liquid depth of any septic tank or its compartments shall be not less than two and one-half feet nor greater than five feet.

(c) No tank or compartment shall have an inside horizontal dimension less than 36 inches.

(d) If the tank has more than one compartment, the first compartment shall have at least the same capacity of the second and shall not exceed twice the capacity of the second. Tanks or compartments shall be connected in series and shall not exceed four in number in any one installation.

§ 73.33. **Inlet and outlet connections.**

(a) The inlet invert shall be a minimum of three inches above the outlet invert.

(b) Inlet and outlet connections of tanks or compartments shall be submerged by means of vented tees or baffles.

(c) Inlet baffles or vented tees shall extend below the liquid level at least six inches. In no case should penetration of the inlet device exceed that of the outlet device.

(d) The outlet baffles or vented tees shall extend below the liquid surface to a distance equal to 40% of the liquid depth. Penetration of outlet baffles or tees in horizontal cylindrical tanks shall be equal to 35% of the liquid depth.

(e) The inlet and outlet baffles or vented tees shall extend above liquid depth to approximately one inch from the top of the tank. Venting shall be provided between compartments.

§ 73.34. **Access.**

Access to each tank or compartment of the tank shall be provided by a manhole of at least 20 inches in diameter with a removable cover. Manhole extensions shall terminate at least 12 inches below the surface or be airtight.

§ 73.35. **Extension cleanout.**

A minimum six-inch extension cleanout with sealed cover shall be installed to grade from inlet tee or baffle access.

AEROBIC SEWAGE TREATMENT SYSTEMS

§ 73.41. **General.**

(a) Aerobic sewage treatment systems shall be installed only on an experimental basis. No approving body shall issue a permit for the installation of an aerobic sewage treatment system without prior written approval by the Department.

(b) Aerobic systems may be considered for use as a means of providing a higher degree of sewage treatment.

(c) The Department may require that permit applications for such systems be submitted to it for review and may prescribe standards in addition to or in lieu of the standards set forth in this Chapter.

§ 73.42. **Design and loading criteria.**

(a) Tanks shall be watertight and constructed of sound and durable material not

subject to excessive corrosion or decay.

(b) The shape of the tank, inlet and outlet arrangements, compartments and baffling shall be so designed so as to:

(1) prevent excessive short-circuiting of flow;

(2) prevent deposition of sludge in the aeration compartment; and

(3) prevent excessive accumulation of scum in the settling compartment.

§ 73.43. **Capacity.**

(a) Minimum liquid capacity of the aeration compartment shall be 500 gallons or 100 gallons per bedroom, whichever is larger.

(b) Manufacturers' specifications shall be taken into consideration when approving the unit.

(c) Other criteria shall meet the provisions of the Pennsylvania Department of Environmental Resources Sewerage Manual Standards.

§ 73.44. **Aeration methods.**

(a) Aeration shall be achieved by diffusion, with or without contact media, by the use of mechanical aeration or by a combination of the two methods.

(b) The quantity of air supplied shall not be less than 1,750 cubic feet per pound of influent five-day B.O.D.

(1) Air may be introduced continuously or intermittently.

(2) If intermittent, the operation shall be cycled to limit any off period to a maximum of four hours and to maintain aerobic conditions in the system at all times.

(c) Mixing may be accomplished by diffused air, by the aerator mechanism, or by other mechanical means and shall be adequate to prevent deposition of sludge.

§ 73.45. **Electrical and mechanical components.**

(a) Electrical components and all wiring shall comply with the requirements of the National Electrical Code (ASA c 1-1953).

(b) Mechanical components, such as motors, pumps, grinders, compressors and aerators, shall be of sufficient capacity to provide adequate treatment and shall be capable of continuous operation with minimal requirements for lubrication and other maintenance. All mechanical components shall be readily accessible for inspection and maintenance.

§ 73.46. **Influent.**

Organic loading shall be computed as equivalent to 0.17 pound of five-day B.O.D. per capita per day or 0.34 pound of five-day B.O.D. per bedroom per day.

§ 73.47. **Effluent.**

(a) The operation of a household aerobic sewage treatment system shall provide an effluent with an average five-day B.O.D. of not more than 35 mg per liter in samples composited in accordance with the latest edition of "Standard Methods of Analysis of Water and Sewage" as published by the American Public Health Association.

(b) The concentration of suspended solids in the effluent shall not exceed an average of 100 mg per liter in properly composited samples.

DISTRIBUTION BOXES

§ 73.51. **Installation.**

When a distribution box is used, it shall have a removable cover and shall be installed level to provide equal distribution of treatment tank effluent to each line.

§ 73.52. Construction.

(a) Distribution boxes shall have removable covers.

(b) Each lateral shall be connected separately to the distribution box.

(c) The inverts of all outlets shall be at the same elevation and the inlet invert shall be at least one inch above the outlet inverts. The outlet inverts shall be at least four inches above the bottom of the distribution box.

(d) (1) In the event that treatment tank effluent is discharged to the distribution box by a siphon or pump, a baffle shall be installed in the distribution box.

(2) The baffle shall be secured to the bottom of the box and shall extend vertically to a point level with the crown of the inlet pipe.

(3) The baffle shall be perpendicular to the inlet.

ABSORPTION AREA REQUIREMENTS

§ 73.61. General.

(a) When the percolation rate is over 60 minutes per inch, a subsurface disposal system as described in this Chapter shall not be used. Proposed alternate methods shall not be used unless approved by the Department.

(b) In every case, sufficient absorption area shall be provided for at least three bedrooms.

(c) Absorption area for standard trenches and seepage beds shall be computed as trench-bottom area.

(d) Absorption area for seepage pits shall be computed as effective sidewall area below the inlet.

§ 73.62. Percolation tests.

Percolation tests shall be conducted in accordance with the following procedure:

(1) *Number and location* - Six or more tests shall be made in separate test holes spaced uniformly over the proposed absorption field site.

(2) *Type of hole* - Holes shall be bored or dug with horizontal dimensions of from four to twelve inches and vertical sides to the depth of the proposed absorption trench. Four-inch augers may be used for boring.

(3) *Preparation* - The bottom and sides of the hole shall be scratched with a knife blade or sharp-pointed instrument, in order to remove any smeared soil surfaces and to provide a natural soil interface into which water may percolate. All loose material shall be removed from the hole. Two inches of coarse sand or fine gravel shall be added to protect the bottom from scouring and sediment.

(4) *Identity of results* - Saturation occurs when the void spaces between soil particles fill with water, and is a relatively short process. Swelling is caused by intrusion of water into individual soil particles, and is a slow process, especially in clay-type soils, requiring a long soaking period.

(5) *Procedure* - Holes shall be filled to a minimum depth of 12 inches over the gravel and consistent with the following provisions:

(i) In most soils it is necessary to refill the hole by supplying a surplus reservoir of water to keep water in the hole for a minimum of four hours, preferably overnight.

(ii) The percolation rate shall be determined 24 hours after water is added to the hole.

(iii) This procedure shall insure that the soil is given opportunity to swell, thereby simulating its condition in wet seasons.

(iv) The swelling procedure is not essential for sandy soils, and the test may be made after water from one filling has seeped away as described in paragraph (6) (iii) of this section.

(6) *Measurement* - With the exception of sandy soil, percolation measurements

shall be made on the day following the procedure described in paragraph (5) of this section and in the following manner:

(i) *Water remaining.* If water remains in the test hole after the overnight swelling period, its depth shall be adjusted to approximately six inches over the gravel. The drop in water level shall be measured from a fixed reference point over a thirty minute period. This drop shall be used in calculating the percolation rate.

(ii) *No water remaining.* If no water remains in the hole after the overnight swelling period, clear water shall be added to bring the depth of water in the hole to approximately six inches over the gravel and consistent with the following:

(A) The drop in water level shall be measured from a fixed reference point for four hours at approximately thirty minute intervals.

(B) The drop that occurs in the final thirty minute period shall be used to calculate the percolation rate. The drops during earlier periods may provide information for possible modification of the procedure to suit local conditions.

(iii) *Sandy soil.* In sandy soils (or other soils in which the first six inches of water seep away in less than thirty minutes, after the overnight swelling period), the time interval between measurements shall be taken as ten minutes and the test run for one hour. The drop that occurs during the final ten minutes is used to calculate the percolation rate.

§ 73.63. Absorption area requirements for private residences.

The following figures shall show absorption area requirements for effluents of private residences, including allowances for garbage grinders (referred to as G.G.) and automatic sequence washing machines (referred to as A.W.):

Percolation Rates	Septic Tanks (Sq. ft./bedroom)	Aerobic Tanks (Sq. ft./bedroom)
15 or less	175	120
16 - 30	250	210
31 - 45	300	300
46 - 60	330	330

(1) Percolation rates shall be determined by the time it takes water to fall one inch, expressed in minutes.

(2) Both septic tanks and aerobic tanks shall utilize standard trenches, seepage beds and seepage pits in the absorption area.

(3) Aerobic sewage treatment systems, which utilize reduced absorption areas for effluent disposal, as shown in the figures, are experimental and shall be so indicated on permits.

§ 73.64. Absorption area requirements for multiple dwellings and other establishments.

(a) The following figures shall indicate maximum absorption area requirements for septic tank effluents of multiple dwellings and other large establishments, including allowances for garbage grinders (G.G.) and automatic sequence washing machines (A.W.):

	Maximum Rate of Septic Tank Effluent Application			
Percolation Rate	sq. ft./GPD	sq. ft./GPD with G.G.	sq. ft./GPD with A.W.	sq. ft./GPD with G.G. & A.W.
15 or less	.75	.90	1.05	1.20

Percolation Rate	Maximum Rate of Septic Tank Effluent Application sq. ft./GPD	sq. ft./GPD with G.G.	sq. ft./GPD with A.W.	sq. ft./GPD with G.G. & A.W.
16 - 30	1.10	1.30	1.55	1.75
31 - 45	1.25	1.50	1.75	2.00
46 - 60	1.65	2.00	2.30	2.65

(b) The following figures shall indicate maximum rates of aerobic tank effluent application, including allowances for garbage grinders (G.G.) and automatic washers (A.W.):

Percolation Rate	Maximum Rate of Aerobic Tank Effluent Application sq. ft./GPD	sq. ft./GPD with G.G.	sq. ft./GPD with A.W.	sq. ft./GPD with G.G. & A.W.
15 or less	.50	.60	.75	.85
16 - 30	.95	1.10	1.30	1.50
31 - 45	1.25	1.50	1.75	2.00
46 - 60	1.65	2.00	2.30	2.65

(c) The absorption rate is expressed in the table in subsection (b) of this section in terms of gallons per day (referred to as G.P.D.).

(d) Aerobic tanks require less absorption area than conventional septic tank effluents. Aerobic sewage treatment systems are experimental and shall be so indicated on permits.

SUBSURFACE LEACHING SYSTEMS

§ 73.71. Separate system requirement.

When the amount of sewage exceeds that which can be disposed of in 5,000 square feet of absorption area, separate leaching systems shall be used. The leaching systems shall have equal disposal capabilities.

§ 73.72. Standard trenches.

(a) *Construction* Standard trench disposal systems shall be constructed in accordance with the following standards:

(1) The disposal field shall be located in an unobstructed area.

(2) Liquid from the treatment tank or distribution box shall be discharged to the absorption field through a watertight line of at least four-inch diameter with a grade of at least one-fourth inch per foot.

(3) Laterals shall be four inches in diameter. All open joints shall be protected on the top by strips of asphalt, treated building paper or by other acceptable means. All bends used in the disposal field shall be made with elbows, T's or Y's.

(4) Aggregate materials shall be clean crushed stone gravel or similar insoluble, durable and acceptable material, one-half to two and one-half inches in size. The aggregate shall completely encase the tile.

(5) The top of the aggregate material shall be covered with untreated building paper or a two inch layer of hay or straw or other material to prevent settling of backfill material into the aggregate.

(6) The trench above the aggregate material shall be hand filled with four to six inches of earth before completing backfill.

(b) *Design* Trenches in a tile disposal field shall be constructed in accordance with the following standards:

(1) Minimum number of lines per field - 2.
(2) Maximum length of individual lines - 100 feet.
(3) Minimum bottom width of trench - 12 inches.
(4) Maximum bottom width of trench - 36 inches.
(5) Minimum depth of trench bottom - 24 inches.
(6) Grade of trench - 0 to 4 inches per 100 feet.
(7) Minimum width of earth between trenches - 5 feet.
(8) Minimum depth of earth cover over the gravel fill in all trenches - 12 inches.
(9) Trenches shall follow approximately the ground surface contours so that variations in trench depth shall be minimized.
(10) There shall be at least six feet of undisturbed earth between the septic tank and the nearest trench.
(11) Uniform grade of tile lines - 2 to 4 inches per 100 feet.
(12) Minimum depth of aggregate material under tile - 6 inches.
(13) Minimum depth of aggregate material over tile - 2 inches.

§ 73.73. Serial distribution.

Serial distribution systems shall use the same standards outlined in § 73.72 of this Title (relating to standard trenches), with the following exceptions and additions:
(1) All laterals and trenches shall be interconnected to form a continuous system.
(2) The bottom of each trench and its tile line shall have a relatively level grade.
(3) Trench connecting or relief lines shall be at least four-inch tight joint sewer pipes with direct connections to the tile line in adjacent trenches or to a drop box arrangement.
(4) The trench for the relief pipe shall be dug no deeper than the top of the gravel. The relief line shall rest on undisturbed earth. Backfill shall be tamped.
(5) Relief lines connecting individual trenches shall be located as far from each other as practicable to prevent short circuiting.
(6) The invert of the overflow pipe in the first relief line shall be at least four inches lower than the invert of the septic tank.

§ 73.74.* Seepage pits.

(a) *Conditions.* No seepage pit shall be installed in areas which the Department has delineated as questionable because of soil or geologic conditions, without the prior written approval of the Department. When seepage pits are used as a method of disposing of liquid, the following criteria shall be met:
(1) The seepage pit shall not be installed in areas where combinations of topography and soil or geologic conditions might allow leaching to the ground surface, underground or surface waters.
(2) Percolation rates of the soil at depths at the bottom of seepage pits shall be thirty minutes or less per inch and more than five minutes per inch in any stratum.
(3) The seepage pit shall not terminate in soils or bedrock which will not filter the liquid prior to reaching underground waters.
(4) The pit shall terminate at least four feet above the maximum watertable.
(b) *Construction.* To prevent cave-in, the pit shall be lined with brick, stone or block at least four inches thick, laid in a radial arch to support the pit walls. In addition the following requirements shall be met:
(1) The brick, stone or block shall be laid watertight above the inlet and with open joints below the inlet to provide adequate passage of liquids.
(2) A minimum annular space of six inches between the lining and excavation wall shall be filled with an aggregate material of clean crushed stone or similar insoluble durable and acceptable material one-half to two and one-half inches in size.
(3) (i) The top of the seepage pit shall be constructed to be capable of supporting the over-burden of earth and any reasonable load to which it might be subjected.

(ii) Access to the pit shall be provided by means of a manhole or inspection hole equipped with a watertight cover.

(iii) The top of the seepage pit shall be not less than twelve inches below the ground surface.

(iv) There shall be provided an inspection pipe of six to eight inches in diameter extending through the cover to a point above the pit at ground level.

(v) The top of the inspection pipe shall be provided with a removable airtight cap.

(4) All seepage pits shall be at least four feet in diameter.

(5) If more than one seepage pit, the pits shall be separated by a distance equal to three times the diameter of the larger pit (measured from edge to edge).

§ 73.75. Seepage beds.

Whenever seepage beds are employed, they shall meet the general standards outlined in § 73.72 of this Title (relating to standard trenches), with the following changes:

(1) The entire bed shall have a minimum depth of twelve inches of clean aggregate material one-half to two and one-half inches in diameter extending at least two inches above and six inches below the laterals.

(2) Laterals shall be placed in the bed on a maximum of six feet centers and no further than three feet from the bed sidewall.

(3) The bottom of the bed and tile shall be level.

(4) When more than one bed is used there shall be a minimum of six feet of undisturbed earth between adjacent beds. The flow may be divided by use of a distribution box or the beds may be connected in series in accordance with the method outlined in § 73.73 of this Title (relating to serial distribution).

§ 73.76. Subsurface sand filters.

(a) *General.* Subsurface sand filters without underdrains shall meet the following criteria:

(1) The first four feet of soil depth shall be unsuitable for the installation of tile disposal fields and seepage beds.

(2) The percolation rate of the soil at depth greater than four feet shall be within the range outlined in § 73.63 of this Title (relating to absorption area requirements for private dwellings).

(3) The data shall be used in determining the absorption area requirements for the system.

(b) *Construction.* Sand filters shall be constructed as follows:

(1) Filter material shall be clean coarse sand all passing a screen having four mesh per inch. The effective size shall be between 0.3 and 0.6 mm with a uniformity co-efficient of not greater than 3.5. Sand shall be placed in the entire bed to a minimum depth of twenty-four inches.

(2) The laterals shall be surrounded with two inches of coarse screened gravel or crushed stone of one-half to two and one-half inch size.

(3) Slope of the laterals shall be approximately three inches in fifty feet (0.5% grade) when dosing tanks are not used and one and one-half inch in fifty feet (.25% grade) when dosing tanks are used.

(4) Laterals shall be perforated pipe or agricultural tile.

(5) Laterals shall be laid on six foot centers covered with at least six inches of clean fill with ah .nes located at least three feet from the outer edge of the bed.

§ 73.77. Dosing tanks.

(a) *General.* A dosing tank shall be used in the following cases:

(1) When the total length of the laterals exceeds 500 lineal feet. When the total length of the laterals exceeds 1,000 lineal feet the dosing tank shall be provided with two siphons or pumps dosing alternately and each serving one-half of the leaching system.

(2) When the leaching system is a subsurface sand filter, and when the total area of the filter exceeds 1,800 square feet or the total length of the laterals exceeds 300 lineal feet.

(b) *Construction.* Dosing tanks shall be constructed according to the following specifications:

(1) Dosing tanks shall be constructed of materials to the specifications outlined in § 73.32 of this Title (relating to construction of septic tanks).

(2) An effective overflow to the laterals shall be provided.

(3) The dosing tank capacity shall be designed to provide for discharge of a volume of effluent equal to 60% to 75% of the internal volume capacity of the laterals. Sufficient laterals shall be provided so that they are dosed not more than six times in 24 hours.

(c) *Dosing siphons or pumps.* Siphons or dosing pumps shall have a discharge at minimum head at least 100% in excess of the maximum rate of inflowing effluent to the dosing tank, and at least 90 gallons per minute at average head per 1,000 square feet of leaching area.

Subchapter C. COMMUNITY SEWAGE DISPOSAL SYSTEMS

GENERAL

§ 73.81. Overall requirements.

In addition to the applicable standards in Subchapter B of this Chapter (relating to standards for individual sewage disposal systems), the following criteria shall be adhered to in design and installation of community sewage disposal systems:

(1) The applicant shall supply written justification that connection to public sewerage facilities or provision of a sewage treatment plant with discharge to waters of this Commonwealth is not feasible.

(2) The daily sewage flow for community sewage disposal systems utilizing subsurface leaching devices for final disposal of sewage effluent into the soil, shall not exceed 15,000 gallons per day.

(3) No permit shall be issued for the installation of a community sewerage system without the prior written approval of the Department.

(4) The applicant, his heirs, successors or assigns shall be responsible for the satisfactory operation and maintenance of the community system.

§ 73.82. Approval under other laws.

Attention shall be directed to the necessity of obtaining approval of the Department for sewers or any other structure within the limits of streams under its jurisdiction. It shall have jurisdiction over encroachments on all streams with watersheds at points concerned of one-half square mile (320 acres or more) or if there is danger to life and property regardless of the watershed area.

§ 73.83. Treatment tanks.

Construction and installation of treatment tanks shall be in accordance with the provisions of § § 73.31 - 73.47 of this Title (relating to standards for individual sewage disposal systems).

§ 73.84. Septic tanks.

The total septic tank capacity for a system with subsurface disposal shall not be less than 1,500 gallons. With sewage flows greater than 1,500 gallons per day, the minimum liquid tank capacity shall equal 1,125 gallons plus 75% of the daily sewage flow.

§ 73.85. Aeration tanks.

The minimum liquid capacity of an aeration tank shall be in accordance with the provisions of § § 73.41 - 73.47 of this Title (relating to standards for individual sewage disposal systems) and shall provide for a minimum 24 hours detention time.

§ 73.86. Leaching systems.

(a) *Design.* Leaching systems for community sewage disposal systems shall be designed in accordance with the standards prescribed in § § 73.71 - 73.77 of this Title (relating to leaching systems for individual sewage disposal systems).

(b) *Effluent.* Leaching systems shall be provided with adequate facilities for dosing the absorption area and distribution of the effluent.

§ 73.87. Sewage flows.

(a) *Private residences.* The volume of sewage for private residences shall be computed on the basis of 100 gallons per bedroom a day.

(b) *Other establishments.* The quantities of sewage flow from other than private residences shall be determined from the following information:

Type of Establishment	Gallons/Person/Day Lbs. 5 Day BOD/Person/Day (Unless Otherwise Noted)	
Residential	**Gal.**	**BOD**
Hotels and motels without private baths	40	.15
Hotels and motels with private baths	50	.15
Luxury residences and estates	125	.17
Multiple family dwellings or apartments	60	.17
Rooming houses	50	.15
Single family dwellings	75	.17
Commercial		
Airline catering per meal served	3	.03
Airports (per passenger - not including food)	5	.02
Airports (per employee)	10	.06
Bus service areas not including food	5	.02
Country clubs not including food	30	.02
Day workers at offices	10	.06
Drive-In theaters (not including food - per space per day)	10	.06
Factories and plants (exclusive of industrial wastes)	35	.08
Laundries, self-service (gallons per washer)	400	2.00
Movie theaters (not including food) (per auditorium seat)	5	.03
Restaurants (toilet and kitchen wastes per patron)	10	.06
(Additional for bars and cocktail lounges)	2	.02
Restaurants (kitchen wastes per meal served)	3	.03
Restaurants (with paper service per meal served)	1.5	.01
Service stations (per vehicle served)	10	.06
Stores (per public toilet)	400	2.00
Work or construction camps (semi-permanent) with flush toilets	50	.17
Work or construction camps (semi-permanent) without flush toilets	35	.02

Type of Establishment	Gallons/Person/Day Lbs. 5 Day BOD/Person/Day (Unless Otherwise Noted)	
Institutional	**Gal.**	**BOD**
Hospitals (per bed space)	250	.20
Institutions other than hospitals (per bed space)	125	.17
Mobilehome parks, independent (per space per day)	125	.50
Schools, boarding	75	.17
Schools, day (without cafeterias, gyms or showers)	7	.04
Schools, day (with cafeterias, but no gym or showers)	10	.08
Schools, day (with cafeterias, gym and showers)	13	.10
Recreational and Seasonal		
Camps, day (no meals served)	10	.12
Camps, luxury resort	125	.17
Camps, resort (night and day) with limited plumbing	50	.12
Camps, (tourist) trailer or campground (per space)	100	.50
Cottages and small dwellings (seasonal occupancy)	50	.17
Parks, picnic - with bathhouses, showers and flush toilets	15	.06
Parks, picnic - (toilet wastes only)	5	.06
Swimming pools and bathhouses	10	.06

Subchapter D. OFFICIAL PLAN REQUIREMENTS

§ 73.91. Preparation of plans.

Each municipality shall prepare a plan for the collection and disposal of sewage in compliance with the act. The municipality shall prepare the plan which shall clearly indicate the following elements of the plan which will be embodied in a report containing text, map and analysis:

(1) Areas where community sewerage systems are now in existence, with an evaluation of their potential for expansion to service areas which are unsewered.

(2) Areas where community sewerage systems are planned to be in operation within a ten-year period, and the location of the major elements of these new systems.

(3) An evaluation of the soils in terms of their capability for on-lot disposal of sewage in all areas of the municipality where community sewage systems do not exist.

(4) Other environmental health factors which may have a relationship to the sewage plan, such as pollution of water resources and vector breeding.

§ 73.92. Survey and analysis of existing community sewerage systems.

(a) The survey and analysis of existing sanitary sewerage systems in the municipality shall provide information regarding the following:

(1) The areas of the municipality now served by sanitary systems.

(2) Identification and location of the main intercepting sewer lines with their size and capacity.

(3) Identification and location of all treatment plants and pumping stations.

(4) Determination of the design capacity, percent of use of each treatment plant and degree of treatment.

(5) Identification and location of the discharge of effluent.

(6) Determination of the future potential of each system and treatment plant for expansion to unsewered areas.

(7) A statement indicating whether or not there are combined sewers.

(8) Outline of the drainage basin.

(b) Much of the information required by subsection (a) of this section may be obtained from either the sewer authorities in the municipalities or from the Department.

§ 73.93. Proposed community sewerage systems.

The areas of the municipality where growth and development of sufficient density to support sanitary sewerage facilities within a ten-year period shall be delineated. Within these areas a plan for the collection and disposal of sewage shall be prepared and the plan shall include, but not be limited to, the following elements:

(1) The area to be served.

(2) Location and extent of proposed new systems including treatment plants, intercepting sewers and points of effluent discharge.

(3) Proposed expansion of existing systems including treatment plants and intercepting sewers.

§ 73.94. On-lot disposal of sewage.

(a) The soils in those areas in the municipality where community sewerage systems do not exist, as well as the soils in those areas proposed and not proposed for community sewerage systems, shall be evaluated to determine their capability for on-lot disposal of sewage.

(b) Based on the analysis and evaluation of soils, a land classification system shall be established to determine the suitability of the area for on-lot disposal of sewage. The classification system shall indicate four categories, by degree of limitation, including the following:

(1) *None to slight.* Soils that are suitable for on-lot disposal of sewage.

(2) *Moderate.* Soils that may be suitable providing the sub-soil is permeable.

(3) *Severe.* Soils which are not satisfactory for use due to the presence of impervious water restricting layers, high watertables, alluvial soils and the like.

(4) *Hazardous.* Soils generally not suited for use due to the probability of ground water pollution or contamination.

§ 73.95. Time schedule and coordination.

(a) The official plan for the municipality shall also include an estimated time schedule, where appropriate, for the proposed expansion of sanitary facilities.

(b) Every effort shall be made to integrate, where possible, existing sewerage facilities plans of the municipality and the municipal authorities into the plan to avoid duplication of prior work.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

POCONO INTERNATIONAL CORPORATION
and CHARLES GOLDBERG,

Defendants-Appellants.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 8th day of September, 1975, he served two copies of the Brief for Appellants on Hon. Paul J. Curran, U. S. Attorney

the attorney for the Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. U. S. Court House, Foley Square, New York, N. Y., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

8th day of September, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976